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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. ~~491~~ 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
TRUSTEE, ETC., ET AL.

No. ~~492~~ 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
TRUSTEE, ETC., ET AL.

No. ~~493~~ 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. ~~494~~ 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 23, 1940.

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**United States Circuit Court of Appeals
For the Seventh Circuit**

THE CHASE NATIONAL BANK OF THE CITY OF
NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellant,

7143

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS,
ET AL.,

Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF
NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellee,

7144

vs.

THE INDIANAPOLIS GAS COMPANY,

Defendant-Appellant.

Appeals from the District Court of the United States for
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284 In accordance with Item 2 of the stipulation as to the parts of the record to be included in the record on appeal, a copy of the opinion of the United States Circuit Court of Appeals for the Seventh Circuit is included in this transcript and is as follows:

285 IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 6472. October Term 1937—January Session, 1938.

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| Chase National Bank of the City of New York, Trustee, <i>Plaintiff-Appellant,</i> <i>vs.</i> Citizens Gas Company of Indian- apolis, <i>et al.,</i> <i>Defendants-Appellees.</i> | } Appeal from the Dis- trict Court of the United States for the Southern Dis- trict of Indiana, Indianapolis Divi- sion. |
|--|--|

April 8, 1938.

Before Evans, Major and Treanor, *Circuit Judges.*

Major, *Circuit Judge.* Appellant is the trustee under a deed of trust executed by appellee, Indianapolis Gas Company, on October 1, 1902, to secure a total authorized issue of \$7,500,000 of its first mortgage bonds due October 1, 1952, of which bonds aggregating \$6,881,000 are outstanding. The deed of trust conveyed to the trustee all the properties of the Indianapolis Gas Company, including:

"* * * all corporate and other franchises, rights, easements, privileges and immunities, contracts and property, of whatever name or description, now belonging to or held, or which may hereafter be acquired or held by said Gas Company, together with the rents, issues, income, tolls and profits arising therefrom; * * *

"To Have and to Hold all and singular the above mentioned and described property, acquired, and to be hereafter acquired, * * * and the tolls, incomes, revenues, rents, issues and profits thereof, * * *."

On September 30, 1913, the Indianapolis Gas Company leased its property to appellee, Citizens Gas Company of Indianapolis, for a term of 99 years, including in the lease all the mortgaged property. The lessee, among other things, agreed to perform all the obligations of the lessor under its mortgage, except its obligation to pay the principal of the

bonds, which included, First, the interest on the lessor's bonded indebtedness, and second, the sum of \$120,000 per year to be distributed by the lessee direct to the lessor's stockholders, as dividends upon their stock and the expenses of maintaining the lessor's corporate organization not to exceed \$300 a year. The Indianapolis Gas Company withdrew from active business and the Citizens Gas Company assumed the active management of its business and the mortgaged property. The Citizens Gas Company was a quasi public corporation whose purposes and objects were controlled by a franchise and contract entered into on August 25, 1905, between the city of Indianapolis and three individual citizens who assigned the franchise and contract to the Citizens Company. The franchise and articles of corporation of the latter company provide that all the capital stock of the Citizens Company should be held by trustees with complete and irrevocable power to hold and vote the stock as fully as if they were the owners thereof and to select the members of the Board of Directors; that upon the performance of certain named conditions, and after the expiration of 25 years, it was provided that the trustees and directors should convey to the city all the property of the Citizens Company, subject to the legal obligations of that company, to be held by the city for the use and benefit of its inhabitants.

In *Todd v. Citizens Gas Company of Indianapolis, et al.*, 46 F. (2d) 855, this court held the property of the Citizens Gas to be a public charitable trust and that the property might be conveyed to the city in continuance of the trust, the city being the successor to said Citizens Company as trustee.

For a period of 22 years after the execution of the aforesaid lease, the mortgage property was operated by the Citizens Gas during which period it paid the interest on the bonds either direct to the trustee or to the bondholders themselves. During the same interval, Citizens Gas made extensive improvements on the mortgage property and procured the issuance of some \$2,000,000 additional bonds under the deed of trust of October 1, 1902, to provide for the payment thereof. On two occasions the validity of the

286 lease was questioned and its binding effect upon the Citizens Company was sustained by the Supreme Court of Indiana. (*Fishback v. Public Service Commission of Indiana, et al.*, 193 Ind. 282; *Williams v. Citizens Gas Company*, 206 Ind. 448).

On September 9, 1935, in pursuance of a prior demand by

the city, the Citizens Company conveyed all its property to the City of Indianapolis, as successor trustee, and executed and delivered to the city an instrument of transfer and assignment. This assignment was made subject to all legal obligations of the Citizens Company including its obligations under the lease. The Citizens Company also tendered to the city an assignment of the lease which the city refused to adopt or recognize as binding upon it. The city took actual possession of the property covered by the lease as well as the mortgage and advised the Indianapolis Company that it was ready to negotiate a new lease, and negotiations were instituted which looked toward the modification or the cancellation of the same.

On March 2, 1936, the Indianapolis Company and the city entered into an agreement providing that until the controversy between them as to the binding effect of the lease upon the city had been either adjudicated or settled, the city would pay a sum equal to the interest on the bonds and the dividends on the stock of the Indianapolis Company to the Indiana National Bank of Indianapolis, and that when such controversy was settled or adjudicated, the sum so paid should be disbursed as follows:

“(a) If an agreement of settlement is made, the fund shall be disbursed in accordance with that agreement.

“(b) If it is determined in a litigated case that the lease is binding upon the City or the property acquired by it from the lessee, the entire fund shall be paid to The Indianapolis Gas Company.

“(c) If it is determined in a litigated case that the lease is not binding upon the City or the property acquired by it, reasonable compensation for the use of the mortgaged property (fixed by agreement or by the court) shall be paid to The Indianapolis Gas Company and the balance, if any, to the City.”

Appellant, concerning such agreement, alleges:

“the purpose and intent of said agreement was to bring about a default in the payment of interest, to depreciate the value of the outstanding bonds, to place the income derived from the operation of the mortgaged property beyond the reach of the bondholders, and by these means to coerce the plaintiff and the bondholders for whom plaintiff is Trustee to surrender the rights secured to them under the mortgage and under the lease of September 30, 1913, and thereby make possible a settlement agreement acceptable to the stockholders of The Indianapolis Gas Company and to the City of Indianapolis.”

It is claimed that the agreement of March 2, 1936, is tantamount to an agreement that no interest shall be paid upon the outstanding bonds by any of the defendants unless and until the city and the Indianapolis Company shall so agree, and that as a result of this agreement default was made in the interest payments due October 1, 1936, and April 1, 1937, aggregating more than \$350,000.

Appellant's suit is brought for the purpose of protecting its interest, as Trustee, in the security for its bonds, substantially all of which is in the possession of the city, and its right to be paid the interest on such bonds. The court was asked to declare the lease binding upon the city, so that it would be bound to pay the interest on the bonds and to perform and observe all the covenants and agreements of the mortgagor contained in its deed of trust. It was also prayed that the lease be declared binding upon the Indianapolis Company; that it be restrained from interfering with the lease in any way and that past due interest be paid from the fund being accumulated in the Indiana National Bank.

In the court below, upon the request of the city for a separate determination of the question of that court's jurisdiction, it was decided that appellee, the Indianapolis Company, was an indispensable party to the suit and that it should be realigned as a party plaintiff, thus destroying the diversity of citizenship upon which Federal jurisdiction rested. Appellant's bill of complaint was thus dismissed. Federal jurisdiction of this suit is based solely upon diversity of citizenship, appellant being a citizen of New York and each of the appellees, citizens of Indiana.

The contested issues are:

First: Is the Indianapolis Gas Company an indispensable party to the relief sought by plaintiff in its Bill of Complaint as amended and supplemented?

Second: Should The Indianapolis Gas Company be
287 realigned with the plaintiff as a party plaintiff for the purpose of testing the jurisdiction of the Federal Court?

Third: Should the District Court have dismissed plaintiff's Bill as amended and supplemented for want of jurisdiction?

We conclude that the first contested issue must be answered in the affirmative. While it seems apparent that the essential question involved is whether the lease in question is enforceable against the city, and that both appellant and The Indianapolis Company are so contend-

ing, yet there are other important questions which give rise to controversies between appellant and the Indianapolis Company. There is one thing certain, however, and that is that if the Indianapolis Company be omitted as a party to this litigation, it would be free to relitigate in another court the question of the validity of the lease against the city, irrespective of a final decree in this litigation, which it seems to us would permit an intolerable situation and one "wholly inconsistent with equity and good conscience." To say that the Indianapolis Company is not an indispensable party is the equivalent of granting it permission, either during or subsequent to the present action, to institute suit against the city in the state court and virtually relitigate the same questions, so far as the city is concerned, as are here involved. There are some authorities which apparently sustain appellant's contention, but if so, we find ourselves in disagreement with the application of a theory which is calculated to prolong legal controversies, especially where all the parties are before the court. To view the matter otherwise is to encourage protracted litigation with the rights of innocent parties, such as the bondholders, undetermined for an indefinite time.

Appellant places great stress upon the case of *Old Colony Trust Co. v. City of Omaha*, 230 U. S. 100. The plaintiff in that case was the trustee of a mortgage executed by the Omaha Electric Light and Power Company. In a controversy with the city concerning the Electric Company's franchise, that Company (mortgagor) sought to enforce its franchise rights against the city, and the court decided in favor of the latter. Afterwards, a suit was brought by the trustee of the mortgage, which action it succeeded in maintaining. The city defended this second action, claiming that the first suit was *res judicata*, but the court held the trust company free to maintain its suit unembarrassed by the decree in the former case. So far as appears from the opinion, no question was raised in either suit as to who were indispensable parties, and in neither were all the parties before the court as here. We do not regard it as controlling.

That the Indianapolis Company is at least a proper party is recognized by appellant from the fact that it was named as a party to the suit. (*Lee v. Lehigh Valley Coal Co.*, 267 U. S. 542.) In *Mahon, et al. v. Guaranty Trust and Safe Deposit Co.*, 239 F. 266, this court gave consideration to the question as to whether a mortgagor is a

necessary party in a suit brought by its mortgagee to enforce rights created by virtue of a contract between the mortgagor and third parties. On page 269 is found a citation of many cases in support of each contention. While the facts in that case are different from those here, we think what was said is pertinent. Thus said the court on page 270:

“That such company is an indispensable party is clearly shown when we consider the possible, and in fact probable, embarrassment which the courts will meet, if separate actions in respect to this contract can be maintained in different jurisdictions. If this case were to proceed to trial without the traction company and the court upheld the contract and enforced its terms against the defendant employes, its decision would not be binding upon the mortgagor in a subsequent action. If the traction company were not a party to the action it would have a perfect right to test out the same question in the state court. Such a situation should not be tolerated. The mere statement of the possibilities shows the absolute necessity of making the traction company a party to this action.”

Another opinion by this court cited by appellant as supporting its contention is that of *Equitable Trust Co. of New York v. Denney, et al.*, 24 F. (2d) 169. It is true, in this case the conclusion was reached that the mortgagor, under the situation presented, was not an indispensable party. It seems that we there relied strongly on the fact that a decree in favor of the mortgagee would likewise be favorable to the mortgagor, and that the latter could not be injured or affected by the decree sought. To what extent, if any, the mortgagor here would be benefited by a decree in favor of appellant is conjectural, but we are not dealing with the merits of the controversy, but upon the facts as contained in the bill of complaint. What-
 288 ever merit may be involved, there is a controversy between appellant and the Indianapolis Gas Company which is calculated to affect the interest of the latter. We are convinced that the City of Indianapolis is entitled to have both the appellant and the Indianapolis Gas as parties to this litigation for the important reason that it should not be required to relitigate, in the instant forum, or any other, the matters which can be properly determined and forever settled in the present suit.

As to the second controverted issue, we conclude it must be answered in the negative. This answer, of course, is

predicated upon the basis that there is a collision of interest between appellant and the Indianapolis Company. The argument of the city to the contrary rests entirely upon the premise that the only matter in controversy is whether or not the lease is enforceable against the city, and that in seeking to maintain the affirmative of that position, the Indianapolis Company is just as much interested as is appellant. Whether they are interested on equal terms is difficult for us to determine from the record. True, Indianapolis Company admits the validity of the lease and at least makes some pretense of claiming it is binding upon the city, but it is rather significant that no effort has been made, and so far as the record discloses, none contemplated, looking toward a favorable determination of its position. In its answer to appellant's bill, it admits most of the material allegations, but some it denies, and concludes by requesting that the bill be dismissed as to it. The city cites a number of cases in support of its contention that the Indianapolis Company must be realigned as a party plaintiff. (*Lee v. Lehigh Valley Coal Company, supra*; *Dawson v. Columbia Trust Company*, 197 U. S. 178; *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Mahon v. Guaranty Trust and Safe Deposit Company, supra*.) A perusal of these authorities discloses that such realignment has been required when there is no actual controversy between plaintiff and defendant, or no bona fide prayer for relief against it. If it be conceded, however, that appellant and the Indianapolis Company occupy a similar position with respect to the validity and enforcement of the lease against the city, yet we think there are sufficient matters in controversy between them to prevent the latter from being realigned with appellant as plaintiff. The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented. (*Boston Safe-Deposit & Trust Co. v. City of Racine*, 97 Fed. 817.) It is not sufficient that they merely be in accord upon one issue or some of the issues. (*Sutton v. English*, 246 U. S. 199; *Mahon v. Guaranty Trust and Safe Deposit Company, supra*; *Franz v. Franz*, 15 Fed. (2d) 797.)

As was said by this court in *Mahon v. Guaranty Trust and Safe Deposit Company, supra*, page 269:

"One of the tests by which the court may determine whether a defendant should be aligned with the plaintiff is the prayer for relief. If no relief is sought against a defendant, such defendant should ordinarily be treated

as a plaintiff. *Dawson v. Columbia Avenue Trust Co.*, 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713; *Steele v. Culver*, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74. Whether we examine the entire bill or merely the prayer for relief, we must reach the same conclusion, viz., that the traction company and the plaintiff are on the same side of this controversy. We fail to find any collision of interest between them. Both are interested in obtaining the same relief."

Appellant, among other things, is seeking to have the lease declared as part of the security for its bonds, while the Indianapolis Company is adverse to such a declaration; appellant requests that the city be ordered to pay the interest on the bonds direct to appellant, as the Citizens Company had done throughout the term of the lease, but the Indianapolis Company, by entering into an agreement with the city under date of March 2, 1936, seems to assert that the interest should be paid direct to it; appellant also requests that its expenses and attorney fees be paid out of the funds being accumulated in the Indiana National Bank of Indianapolis under the contract of March 2, 1936. Inasmuch as both appellant and Indianapolis Company have an interest in the accumulated funds, and the greater the amount of the recovery by the former, the less there will be for the latter, a controversy of some proportions is calculated to develop.

Appellant also seeks to enjoin the Indianapolis Company from interfering with the lease in any way and to have the lease declared binding upon that company as well as upon the city. While it is true appellant has not seen fit to press its request for such relief, yet it has prayed for the same and who can say, in view of the situation presented, that it may not be required so to do. We are of the opinion that the relation existing
289 between appellant and the Indianapolis Company is such that the latter should not be realigned with the appellant.

Having decided the second controverted issue in the negative, it necessarily follows that the third must be given a like answer.

The cause is reversed with directions to proceed in accordance with the views herein expressed.

A true Copy:

Teste:

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Treanor, Circuit Judge, Dissenting. I agree that the Indianapolis Gas Company is a necessary party to the full determination of the controversy; but I cannot agree that there is any "collision of interest" between the Indianapolis Gas Company and the plaintiff. In my opinion the only substantial, and the dominating question, presented in this suit is whether the lease is a valid and enforceable obligation against the City of Indianapolis. And as respects that question the interests of the plaintiff, as trustees of owners of bonds of the Indianapolis Gas Company, and the Indianapolis Gas Company are identical. I find nothing in the agreement of March 2, 1936, between the city and the Indianapolis Gas Company to create an adversity of interest between the plaintiff and the Indianapolis Gas Company. The terms of that agreement provided for payments by the city pending a determination of the controversy between the city and the Indianapolis Gas Company as to the enforceability of the lease against the city, and expressly provides against prejudice to the rights of the Indianapolis Gas Company respecting the lease; and in general had as its objective to safeguard against any interruption in the gas utility service and to insure the ultimate payment to the Indianapolis Gas Company of all amounts due under the lease in case the lease finally should be determined to be valid and enforceable against the city.

I think that the District Court's conclusion that the Indianapolis Gas Company was an indispensable party to the controversy but that it should be aligned in interest with the plaintiff was correct. Consequently, diversity of citizenship did not exist as a ground of jurisdiction. And in my opinion the District Court's order of dismissal for want of jurisdiction should be affirmed.

Endorsed: Filed April 8, 1938. Frederick G. Campbell, Clerk.

291 And afterwards, towit, at the May Term of said Court, on the 24th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals, and files mandate reversing decree with costs, plaintiff to recover \$477.13 costs from the defendants, which mandate is as follows:

292 United States }
 of America, } ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Southern District of Indiana, Indianapolis Division. (Seal)

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of Indiana, Indianapolis Division before you, or some of you, in a cause between The Chase National Bank of the City of New York, Trustee, Plaintiff, and Citizens Gas Company of Indianapolis, a corporation, The City of Indianapolis, a municipal corporation, The Indianapolis Gas Company, a corporation, William J. Mooney, Sr., A. Dailas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungelaus, Rpy Sahm, David J. Angus, Isaac E. Woodward and Russell J. Ryan, as Members of the Board of Directors for Utilities of the City of Indianapolis, Defendants, Number 1844, a Decree was entered on the fifteenth day of November, 1937.

As by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an Appeal by The Chase National Bank of the City of New York agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the term of October, in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is ordered, adjudged and decreed by this Court that the Order or Decree of the said District Court in this cause appealed from be, and it is hereby reversed with costs; and that this cause be, and it is hereby remanded to the said District Court with directions to proceed in accordance with the views expressed in the Opinion of this Court.

Friday, April 8, 1938.

And afterwards, to-wit: On the twenty-fifth day of

April, 1938, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing was denied on the twenty-fourth day of May, 1938.

And further that the Appellant, The Chase National Bank of the City of New York recover against the Appellees, Citizens Gas Company of Indianapolis, et al., the sum of Four Hundred Seventy-seven and 13/100 Dollars (\$477.13) for their costs herein expended with direction to award execution therefor.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Decree notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the twenty-second day of October in the year of our Lord one thousand nine hundred and thirty-eight.

(Signed) Frederick G. Campbell,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

(Here follows the detailed statement of costs.)

294 And afterwards, to-wit, at the May Term of said Court, on the 28th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Come now the parties by their respective solicitors, and there having been filed herein a mandate of the United States Circuit Court of Appeals directing this Court to proceed in accordance with the views expressed in the opinion of that Court;

It is now, thereupon, ordered that the order entered herein on the fifteenth day of November, 1937, dismissing the bill of complaint as amended and supplemented, and the counter-claim of the defendants herein for want of jurisdiction is now hereby set aside, and the Court now finds that this Court does have jurisdiction.

It is further ordered that this case be assigned for trial at the United States Court House at Indianapolis, Indiana, on Thursday, January 5, 1939, at 10:00 A. M., and is assigned for pre-trial conference on Saturday, December 3, 1938, at 9:30 A. M. to each of which rulings the City of Indianapolis and the individual defendants, who are members of the Board of Trustees and Directors of the Department of Utilities of the City of Indianapolis, except.

Entered
Oct. 28,
1938.

Filed
Dec. 22,
1938. 295 And afterwards, to-wit, at the November Term of said Court, on the 22nd day of December, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff by its attorneys and files motion for leave to file second amendment and supplement to bill, which motion is granted and is as follows: (H. I.)

And the plaintiff now files second amendment and supplement to plaintiff's bill of complaint, which is as follows:

296 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

| | |
|--|-----------------------|
| The Chase National Bank of the City of New York, Trustee, | } In Equity No. 1844. |
| <i>Plaintiff,</i> | |
| <i>vs.</i> | |
| Citizens Gas Company of Indianap- olis, <i>et al.</i> , | } |
| <i>Defendants.</i> | |

SECOND AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

William L. Taylor,
State Life Building,
Indianapolis, Indiana,
Howard F. Burns,
Union Commerce Building,
Cleveland, Ohio,
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Of Counsel.

297 The plaintiff, The Chase National Bank of the City of New York, Trustee, by leave of Court first had and obtained, files this its Second Amendment and Supplement to the bill of complaint heretofore filed herein. (For the convenience of Court and counsel the paragraphs herein are numbered beginning with Paragraph 26 to follow the last numbered paragraph of the original bill of complaint.)

26. On or about September 9, 1935, the Board of Trustees of the Citizens Gas Company and the Board of Directors of the Citizens Gas Company, each of said boards acting separately, authorized the conveyance, transfer, and assignment of all property of the Citizens Gas Company, including the leasehold estate created by the lease of September 30, 1913, (Exhibit B to the bill of complaint), to the City of Indianapolis, in order to carry out and execute the public charitable trust established and provided for by the Articles of Incorporation of said Citizens Gas Company and the Franchise Contract of August 25, 1905, between said City and the assignors of said company (which Franchise Contract and Articles of Incorporation are attached to the bill of complaint as Exhibit C). The Board of Trustees and the Board of Directors of said Citizens Gas Company each authorized such conveyance, transfer, and assignment to the City upon the express condition that the City of Indianapolis should execute and deliver to said Citizens Gas Company an Indemnity Agreement in the form set forth in the separate minutes of said Trustees and said Directors. In pursuance of this requirement the City of Indianapolis, acting by the Board of Directors for Utilities of the City of Indianapolis, executed and delivered to Citizens Gas Company on or about September 9, 1935, an Indemnity Agreement in the form required by the Board of Directors and by the Board of Trustees of said Citizens Gas Company. A true copy of said Indemnity Agreement is attached hereto, marked "Exhibit J," and made a part hereof.

27. Since the filing of this suit the City of Indianapolis has deposited with The Indiana National Bank the sum of \$1,157,875 in pursuance of the agreement of March 2, 1936 (Exhibit H), which sum is now on deposit with said The Indiana National Bank. All of said fund has been derived from and is the proceeds of the operation of the property transferred, conveyed, and assigned by Citizens Gas Company to the City of Indianapolis, including the leased property, and said fund is therefore subject to the claims and liens asserted in this cause upon all property transferred to the City by the Citizens Gas Company (including the leased property), and the proceeds, rents, issues, and profits therefrom. Neither The Indianapolis Gas Company nor the Citizens Gas Company of Indianapolis nor the City of Indianapolis has paid any part of the semi-annual interest on the First Consolidated Mortgage Five Per Cent. Gold Bonds of The Indian-

apolis Gas Company (hereinafter sometimes called the "Bonds") due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938, and October 1, 1938, in the sum of \$172,025 due on each of said dates, and there is now overdue and unpaid as interest on said Bonds the sum of \$860,125. The City of Indianapolis has, however, paid all the State, County, and Municipal taxes on the leased property becoming due after September 9, 1935, all the insurance premiums for insurance on the leased property becoming due since said date, all instalments of Federal income taxes of The Indianapolis Gas Company falling due between September 9, 1935, and December 31, 1936, on account of any money paid by the Citizens Gas Company or the Department of Utilities of the City of Indianapolis to The Indianapolis Gas Company during the years 1934 and 1935, and has paid all instalments of the Indiana gross income tax of The Indianapolis Gas Company falling due after September 9, 1935, to and including the payment of said tax due on April 15, 1936, all in accordance with the terms and provisions of said lease (Exhibit B) by which the lessee agreed for itself and its assigns to pay said taxes and insurance premiums.

28. By reason of the facts that

(a) The Indianapolis Gas Company, the Citizens Gas Company, and the City of Indianapolis are in default in the payment of interest on the Bonds in an amount exceeding \$860,000, as above set forth,

(b) neither The Indianapolis Gas Company nor Citizens Gas Company, nor both of them, have property sufficient to pay the interest in default on the Bonds, other than the property now in the possession and under the control of the City of Indianapolis,

(c) the Citizens Gas Company made certain agreements in the lease of September 30, 1913 (Exhibit B), for the benefit of the bondholders for whom and as a protection to the security of which plaintiff is Trustee, and

(d) the Citizens Gas Company on or about September 9, 1935, disabled itself from carrying out any of its agreements in said lease by transferring all its property to the City,

the transfer of the property of the Citizens Gas Company and each and every part thereof to the City of Indianapolis on or about September 9, 1935, was fraudulent as to the plaintiff and the bondholders for whom it is Trustee, unless the City of Indianapolis became bound and all of the property conveyed, transferred, and assigned by Citizens

Gas Company to the City of Indianapolis remained bound for all obligations of the Citizens Gas Company under said lease of September 30, 1913 (Exhibit B). The City of Indianapolis received the transfer and conveyance of all the property of Citizens Gas Company on or about September 9, 1935, with full knowledge of the facts that Citizens Gas Company had obligated itself under the lease of September 30, 1913 (Exhibit B), to the plaintiff and the bondholders for whom plaintiff is Trustee, that the transfer and conveyance of the property of the Citizens Gas Com-
299 pany to the City would disable the Citizens Gas Company from performing its obligations under said lease, and that Citizens Gas Company was transferring and conveying all its property to the City and was retaining no property to enable it to perform its obligations under said lease. If the fact be (which plaintiff denies) that the lease of September 30, 1913 (Exhibit B), is not binding on the City of Indianapolis and all the property formerly owned by the Citizens Gas Company and now owned and operated by the City, then the transfer and conveyance of all the property of the Citizens Gas Company to the City was made by the Citizens Gas Company and received by the City with the intent to hinder, delay, and defraud the plaintiff and the bondholders for whom it is Trustee, as creditors of Citizens Gas Company. By reason of these facts plaintiff is entitled (in the event the lease of September 30, 1913 (Exhibit B), shall be held not binding on the City of Indianapolis and all the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the City) to have the conveyance of all its property by Citizens Gas Company to the City of Indianapolis set aside and declared fraudulent as to it and the bondholders whom it represents and to have said property, all improvements and additions thereto, and all proceeds, rents, issues, and profits therefrom, subjected to the judgments prayed for in this cause.

29. The Indianapolis Gas Company is the owner and holder of Bonds in the principal amount of \$120,000, with all coupons maturing October 1, 1936, and thereafter attached. The City of Indianapolis is now the owner and holder of Bonds in the principal amount of \$18,000, with all coupons maturing October 1, 1936, and thereafter attached. Said Bonds in the principal amount of \$18,000 now held by the City of Indianapolis were transferred to it by the Citizens Gas Company on or about September 9, 1935, at the time when all other property of the Citizens Gas

Company was conveyed, transferred, and assigned to the City. By reason of the facts hereinbefore set forth said Bonds in the amount of \$120,000 held by The Indianapolis Gas Company and said Bonds in the amount of \$18,000 held by the City of Indianapolis and any and all other Bonds now held or hereafter acquired by The Indianapolis Gas Company, the Citizens Gas Company, or the City of Indianapolis should not be allowed to participate in the distribution of any funds recovered herein until all other bondholders have been paid in full and all claims of the plaintiff have been paid, satisfied, and discharged.

30. Under the provisions of the lease of September 30, 1913 (Exhibit B), the lessee, Citizens Gas Company, agreed to accept the leased premises of the lessor (The Indianapolis Gas Company) as the same actually were at the date of said lease and to renew, repair, replace, and extend said plants and system so as to maintain and keep the demised premises in as good order, repair, and condition as the same were at the time of making said lease. In violation of said provisions of the lease, and of plaintiff's rights as Trustee under the Mortgage of the leased property. The Indianapolis Gas Company, the Citizens Gas Company, the City of Indianapolis, and the Trustees and Directors for Utilities of said City have refused and neglected to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease and to keep the same in their then state of efficiency. By reason of these facts the gas plants and the distribution system of the lessor, The Indianapolis Gas Company, have been greatly damaged in an amount unknown to this plaintiff, and The Indianapolis Gas Company, the Citizens Gas Company, the City of Indianapolis, and the Trustees and Directors for Utilities of said City, and each of them, are liable to the plaintiff as Trustee under the Mortgage of the property covered by said lease for all losses, damages, costs, charges, and expenses resulting from the failure of said defendants to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease and to keep the same in their then state of efficiency.

31. Under the provisions of said lease the lessee, Citizens Gas Company, was permitted to use as its own all

coal, coke, oil, gas meters, pipe, fittings, tools, horses, wagons, automobiles, and all supplies and merchandise of any kind on hand belonging to the lessor at the time of making said lease, and said lessee agreed that at the termination of said lease it would deliver to the lessor usable and salable supplies and merchandise of a like value or pay to the lessor in money the difference between the value of the property so delivered to the lessor and the total value of the inventory at the time of making said lease. By agreement between The Indianapolis Gas Company and Citizens Gas Company the value of the inventory so turned over to the Citizens Gas Company at the time of making said lease was fixed at \$112,950.43. In the event said lease of September 30, 1913 (Exhibit B), has terminated (which plaintiff denies) the Citizens Gas Company and the City of Indianapolis, and each of them, has been obligated to pay to The Indianapolis Gas Company the sum of \$112,950.43 since the termination of said lease, and they are, and each of them now is, obligated to pay said sum with interest thereon at the rate of six per cent. per annum from the date of the termination of said lease.

Wherefore, plaintiff prays (in addition to the prayers set out in the original bill of complaint as amended and supplemented by the Amendment and Supplement to Plaintiff's Bill of Complaint):

10. That this Court in its final decree enter judgment in favor of the plaintiff against defendants The Indianapolis Gas Company, the Citizens Gas Company of Indianapolis, the City of Indianapolis, and the Trustees and Directors for Utilities of said City, and each of them, in the amount of all unpaid interest on said Bonds, together with interest on such unpaid interest from the several dates upon which such interest payments shall have accrued, at the rate of six per cent. per annum, until paid, and for all losses, damages, costs, charges, and expenses resulting from the failure of defendants to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease, and to keep the same in their then state of efficiency.

11. That (in the event said lease of September 30, 1913, (Exhibit B) has terminated, which plaintiff denies), this Court in its final decree enter judgment in favor of the plaintiff against defendants the Citizens Gas Company of Indianapolis, the City of Indianapolis, and the Trustees

and Directors for Utilities of said City, and each of them, in the sum of \$112,950.43 with interest thereon at the rate of six per cent. per annum from the date of the termination of said lease, and further for all the rents, issues, and profits of said leased property held by the City for the period from September 9, 1935, to the date of judgment, including the sums deposited with The Indiana National Bank as aforesaid, or for the reasonable value of the use of said property, whichever amount may be greater.

12. That this Court in its final decree adjudge, determine and declare that defendant The Indianapolis Gas Company apply to the payment of any and all judgments entered against it in this cause all property, debts, choses in action, and equitable interests belonging to it, or held in trust for it, or in which it is in any way or manner beneficially interested, including (but not intending by the following enumeration to limit the generality of the foregoing description):

(a) Said Bonds held by The Indianapolis Gas Company in the principal amount of \$120,000 and any and all other Bonds now held or hereafter acquired by said Company.

(b) Any and all rights of The Indianapolis Gas Company growing out of the lease of September 30, 1913 (Exhibit B), or out of the transfer by Citizens Gas Company to the City of Indianapolis of the leased property, or both, against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents issues, and profits therefrom (including the sums deposited with The Indiana National Bank of Indianapolis pursuant to the agreement of March 2, 1936); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(c) Any and all rights of The Indianapolis Gas Company growing out of the transfer of all the property of Citizens Gas Company to the City of Indianapolis in fraud of the rights of The Indianapolis Gas Company under the lease of September 30, 1913 (Exhibit B), against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company,

the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(d) Any and all rights of The Indianapolis Gas Company growing out of the Indemnity Agreement dated September 9, 1935 (Exhibit J), against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

302 (e) Any and all rights of The Indianapolis Gas Company growing out of the use of the property of The Indianapolis Gas Company by said City from about September 9, 1935, until the date of judgment, against the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(f) Any and all rights of The Indianapolis Gas Company to the proceeds, rents, issues, and profits from the leased property since on or about September 9, 1935, including the sums so deposited with said The Indiana National Bank.

and further that this Court in its final decree adjudge, determine, and declare the amount of all claims which The Indianapolis Gas Company has against the Citizens Gas Company, the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them, and render judgment therefor, and that this Court adjudge, determine, and declare that all property of said The Indianapolis Gas Company, including all that above

described and including the said judgments or the proceeds thereof, be sequestered and set aside for the following purposes: First, to pay, satisfy, and discharge any and all judgments entered against The Indianapolis Gas Company in this cause and, Second, to hold any surplus of the amount so sequestered (over and above the amounts necessary to satisfy any and all judgments against it entered herein) as additional security for the obligations of The Indianapolis Gas Company under the Mortgage (Exhibit A) or the Bonds secured thereby; and further that no distribution of any of said sequestered property be made to The Indianapolis Gas Company or its stockholders until all obligations of said The Indianapolis Gas Company under the Mortgage or the Bonds issued thereunder have been fully satisfied and discharged or full and adequate security has been furnished by said The Indianapolis Gas Company for the ultimate payment and discharge of all its obligations under said Mortgage.

13. That this Court in its final decree adjudge, determine and declare that defendant Citizens Gas Company of Indianapolis apply to the payment of any and all judgments entered against it in this cause all property, debts, choses in action, and equitable interests belonging to it, or held in trust for it, or in which it is in any way or manner beneficially interested, including (but not intending by the following enumeration to limit the generality of the foregoing description):

(a) All the property transferred, conveyed and assigned to the City of Indianapolis by said Citizens Gas Company on or about September 9, 1935 (including said Bonds in the principal amount of \$18,000 so transferred), all the improvements and additions thereto, and all proceeds, rents, issues, and profits therefrom, including the sums deposited with The Indiana National Bank of Indianapolis pursuant to the agreement of March 2, 1936.

303 (b) Any and all rights of the Citizens Gas Company growing out of the lease of September 30, 1913 (Exhibit B), and the transfer by Citizens Gas Company to the City of Indianapolis of the leased property, against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against

both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(c) Any and all rights of the Citizens Gas Company growing out of the Indemnity Agreement dated September 9, 1935 (Exhibit J), against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(d) Any and all rights of the Citizens Gas Company growing out of the use of the leased property by the City since on or about September 9, 1935, against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank), or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(e) Any and all rights of Citizens Gas Company to the proceeds, rents, issues, and profits from the leased property since on or about September 9, 1935, including the sums so deposited with said The Indiana National Bank. and further that this Court in its final decree adjudge, determine, and declare the amount of all claims which Citizens Gas Company of Indianapolis has against the City of Indianapolis or the Trustees and Directors for Utilities of said City, or any one or more of them, and render judgment therefor, and that this Court adjudge, determine, and declare that all property of said Citizens Gas Company, including all that above described and including the said judgments or the proceeds thereof, be sequestered and set aside for the following purposes: First, to pay, satisfy, and discharge any and all judgments entered against the Citizens Gas Company in this cause, and, Second, to hold any surplus of the amount so sequestered (over and above the amounts necessary to satisfy any and all judgments

against it entered herein) as additional security for the obligations of Citizens Gas Company under the lease (Exhibit B).

14. That this Court in its final decree adjudge, determine and declare the order in which the defendants herein are liable for the amounts found due and the order in which the various assets of the defendants herein, 304 including the properties and assets hereinbefore specifically mentioned, shall be applied to the satisfaction of the judgments entered herein.

15. That pending final determination of this cause the defendants The Indianapolis Gas Company and the City of Indianapolis be enjoined from selling, transferring, in any way disposing of, or in any way encumbering the Bonds held by them in the principal amount of \$120,000 and \$18,000, respectively.

16. That all such other and further relief as may be proper and equitable in the premises be awarded the plaintiff.

William L. Taylor,
Howard F. Burns,
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Of Counsel.

EXHIBIT J.

Indemnity Agreement of September 9th, 1935, Given by City of Indianapolis to Citizens Gas Company.

INDEMNITY AGREEMENT.

Whereas, the Citizens Gas Company of Indianapolis is, by separate instruments, conveying, transferring and assigning to the City of Indianapolis all of its property in order to carry out and execute the public charitable trust established and provided for by the articles of incorporation of said Company and the franchise agreement entered into on the 25th day of August, 1925, by and between the said City and the assignors of said Company; and,

Whereas, said conveyance, transfer and assignment is being made pursuant to, and subject to all the restrictions, stipulations and agreements contained therein, the articles of incorporation of said Company, the franchise agreement entered into between said Company's assignors and the said City of Indianapolis under date of August 25th, 1905,

as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

Now, Therefore, in consideration of the premises and the conveyance, transfer and assignment as aforesaid, it is agreed by the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, by and through the Board of Directors for Utilities of the City of Indianapolis, that it shall hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers,

Directors and Trustees, from any and all loss, damage, 305 cost, charges, liability or expense on account of any actions at law or in equity, or any other proceedings of any nature brought in or before any court, board or other tribunal, on account of the conveyance, transfer and assignment of any or all of the property of the said Company to the said City for the purpose as aforesaid. The City of Indianapolis further agrees that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, Directors and Trustees, from any and all loss, damage, costs, charges, liability or expense on account of any pending actions or suits which have heretofore been instituted against said Company and on account of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act on the part of said company of any nature whatsoever.

Executed this 9th day of September, 1935.

Board of Directors for Utilities
of the City of Indianapolis,

By (Signed) Henry L. Dithmer,
President.

306 And afterwards, to wit, at the November Term of said Court, on the 10th day of January, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant Citizens Gas Company of Indianapolis by its solicitors, and files separate answer to second amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

Filed 307 IN THE DISTRICT COURT OF THE UNITED STATES.
Jan. 10, 1939. • • (Caption—1844) • •

SEPARATE ANSWER OF CITIZENS GAS COMPANY
OF INDIANAPOLIS TO SECOND AMENDMENT
AND SUPPLEMENT TO PLAINTIFF'S BILL OF
COMPLAINT.

Citizens Gas Company of Indianapolis, a defendant in the above entitled cause, for separate answer to the Second Amendment and Supplement to the Plaintiff's Bill of Complaint, says (the paragraphs herein are numbered to correspond with the paragraph numbers of the amendment and supplement):

XXVI.

This defendant admits the averments contained in Subdivision 26 of said second amendment and supplement.

XXVII.

This defendant has no knowledge of the averments contained in Subdivision 27 of the said second amendment and supplement, and neither admits nor denies said averments but requests that plaintiff be required to make strict proof thereof; except that this defendant admits that it has not paid any part of the semi-annual interest upon the bonds and due on the dates mentioned therein.

This defendant avers that it was and is under no obligation or legal liability to pay the said interest for the reasons and because of the facts specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein, and Subdivision XXVIII of this separate answer to the second amendment and supplement thereto.

XXVIII.

This defendant denies that the conveyance and transfer of all of its property to the City of Indianapolis on September 9, 1935, was fraudulent as to the plaintiff or any other person or persons, that the said conveyance and transfer was made by this defendant and received by the City of Indianapolis with an attempt to hinder,

delay and defraud the plaintiff or any other person or persons whatsoever, and that the plaintiff herein is entitled to have said conveyance set aside and declared fraudulent, by reason of the following facts:

(a) Said conveyance was made in the manner and form, and pursuant to this defendant's legal duty and right so to do, as specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein; and,

(b) Whether or not the City of Indianapolis and the said property are bound and subject to the obligations of said lease from and after September 9, 1935, the said ninety-nine year lease is not a valid and legal obligation of this defendant, but that it was entirely and completely released and discharged from any such obligation at the time said conveyance was made to the City of Indianapolis, on September 9, 1935; and,

(c) At the time said conveyance was made, this defendant had completely performed and satisfied all of its obligations and liabilities under the said lease, and that it was not indebted to the Indianapolis Gas Company or the plaintiff or the bondholders for whom the plaintiff is Trustee in any manner; and,

(d) As specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein, this defendant, on and prior to September 9, 1935, was the trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all the rights, property and assets acquired and possessed by it, including the said lease, were possessed and owned by it as such trustee, and for the purposes set forth in the instrument creating said public charitable trust, and the conveyance of the said trust property, as aforesaid, was made to the City of Indianapolis as the successor-trustee of the said public charitable trust, and not otherwise. Accordingly, said conveyance, which was made subject to all legal obligations of this defendant, including the obligation of the said lease, if any there be, amounted in law to no more than a substitution of the City of Indianapolis for this defendant as the trustee of the said public charitable trust and the complete execution by this defendant of its duties as the original trustee as aforesaid. By reason of the foregoing, this defendant was on September 9, 1935, entirely and completely released and discharged from any and all obligations under said lease.

XXIX.

This defendant has no knowledge of the averments contained in Subdivision 29 of said second amendment and supplement, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof; except that defendant admits that at the time of the said conveyance, it transferred bonds in the principal amount of \$18,000 to the City of Indianapolis.

XXX.

As to the averments of Subdivision 30 of said second amendment and supplement, this defendant admits that under the provisions of the said lease, it agreed to accept the leased premises of the lessor as the same actually were at the date of said lease, and to renew, replace and expand said plant and system so as to maintain and keep the said demised premises in as good order, repair and condition as the same was at the time of making said lease. This defendant denies the remaining averments of said subdivision.

XXXI.

This defendant admits the averments contained in Subdivision 31 of said second amendment and supplement, except that it denies that it is under any obligation to the Indianapolis Gas Company, this plaintiff or the bondholders for whom this plaintiff was Trustee, by reason of the facts specifically set forth in Subdivision XX and 311 Subdivision XXVIII of defendant's answer to the original bill of complaint and the amendments and supplements thereto.

Wherefore, this defendant, having fully answered the said second amendment and supplement to plaintiff's bill of complaint, prays that it may go hence without day.

(Acknowledgment of Service.)

312 (Entry for January 10, 1939, continued.)

Comes now the defendant The Indianapolis Gas Company by its solicitors, and files separate answer to the second amendment and supplement to plaintiff's bill of complaint, which is as follows:

313 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

Filed
Jan. 1
1939

**SEPARATE ANSWER OF THE INDIANAPOLIS GAS
COMPANY TO THE SECOND AMENDMENT AND
SUPPLEMENT TO PLAINTIFF'S BILL OF COM-
PLAINT.**

The Indianapolis Gas Company, defendant herein, by way of its separate answer to the "Second Amendment and Supplement to Plaintiff's Bill of Complaint" filed December 23d, 1938 says:

26. For answer to Paragraph 26 thereof, The Indianapolis Gas Company admits upon information and belief that at or about the 9th day of September, 1935 the Board of Trustees of the Citizens Gas Company of Indianapolis and the Board of Directors of that Company, each acting separately, took some action, the exact nature and form of which is to this defendant unknown, and pursuant thereto, under date of the 9th day of September, 1935 the Citizens Gas Company of Indianapolis, by its Vice President, attested by its secretary, made the transfer and assignment of its property which is set out as Exhibit E with the Bill of Complaint; and also by its said officers signed and acknowledged and tendered to the City of Indianapolis the instrument denominated "Assignment of Lease" set out as Exhibit F with said Bill of Complaint;

and that the leasehold therein referred to was the 314 estate created by the instrument set out as Exhibit D with said Bill of Complaint; and admits that in so doing the said Citizens Gas Company purported and intended to carry out and execute the public charitable trust established and provided for by its Articles of Incorporation and its Franchise Contract set out as Exhibit C with the Bill of Complaint. But as to the same having been or not having been authorized upon any express conditions, or as to what is stated in the minutes of proceedings of said Trustees or of said Directors, this defendant has no knowledge unless only by hearsay, and cannot admit or deny the same. And whether or not the city of Indianapolis, by its Board of Directors for Utilities executed and delivered to said Citizens Gas Company the instrument called an Indemnity Agreement attached to and filed with said Second Amendment and Supplement to Plaintiff's Bill of Complaint, marked "Exhibit J," and

whether or not the same was done in pursuance of said requirement by the said Trustees and Directors of said Citizens Gas Company, this defendant does not know except by hearsay, and cannot either admit or deny the same.

27. For answer to Paragraph 27 thereof this defendant, The Indianapolis Gas Company, admits as true all of the independent facts therein stated. But as to the matters the alleged conclusion of fact concerning what the funds deposited in the Indiana National Bank was derived from, and the alleged conclusions of law as to what said fund is subject to, and whether all that has been done by the City of Indianapolis is in accordance with the provisions of the lease filed with the Bill of Complaint as "Exhibit B," this defendant is not sufficiently informed to answer positively and therefore does not admit nor deny.

28. For answer to Paragraph 28 thereof, this answering defendant admits that there is default in the 315 payment of interest on its bonds in an amount exceeding \$860,000.00 and that it does not now possess sufficient property, other than that now operated by the said City to pay such defaulted interest. It neither denies nor admits the alleged conclusions resulting from the facts so averred and states that the same are conclusions of law now before this court for determination.

29. For answer to Paragraph 29, this answering defendant admits that it is the owner and holder of bonds in the principal amount of \$120,000 with coupons maturing October 1, 1936 and thereafter attached, but it denies that by reason thereof said bonds should not be permitted to participate in the distribution of any funds recovered by this plaintiff for all bond holders until all other bond holders have been paid in full, together with all claims of this plaintiff. It further states that it does not know, except by hearsay, whether or not the City of Indianapolis is the owner and holder of any of its bonds nor whether or when any of said bonds, if at all, were transferred to the said City by the Citizens Gas Company, and therefore, neither admits nor denies said averments of ownership.

30. For answer to Paragraph 30, this answering defendant admits the provisions of the lease as alleged and as embodied in the same as filed with the Bill of Complaint and marked Exhibit "B," but says that it has not operated or been in possession of its said property since the

same was taken over under and pursuant to said lease, since which time its said property has been continuously under the operation and control of the Citizens Gas Company of Indianapolis and of the City of Indianapolis through its Department of Utilities, and is now under the operation and control of said city. This defendant says that in executing said lease and transferring the operation and control of its property to the lessee thereunder, 316 it violated no right, duty or obligation to these plaintiffs or to the owners and holders of its bonds.

This defendant is not now informed as to how far and in what particulars the provisions of the lease relative to the maintenance and upkeep of said property have been violated, nor to what extent, if at all, any of its now mortgaged property has been damaged; but this defendant says that, if damage has accrued to its said property through failure of the said Citizens Gas Company of Indianapolis or the City of Indianapolis to maintain the same in accordance with the terms and provisions of said lease, all rights and claims arising from any such failure is vested alone in this answering defendant and not in the plaintiff as averred in the said bill of complaint.

31. For answer to paragraph 31 thereof, defendant The Indianapolis Gas Company admits that subdivision 11 of said lease set out as Exhibit B with the Bill of Complaint contained and contains provisions substantially as averred in the Second Amendment and Supplement to said complaint, and that it and subdivision 12 thereof provide for making an inventory and appraisalment of the property of the lessor taken over by the lessee, and that pursuant to an inventory and appraisalment so made it was agreed that the value of such items of supplies and merchandise owned by the lessor and at that time turned over to the lessee to use as its own under said provisions of the lease was \$112,950.43. But it is informed that the matters of law as to the legal rights, obligations and liabilities of the parties hereunder upon the hypothetical state of facts suggested in said amendment would be for the court to decide, and therefore neither admits nor denies the same.

317 Wherefore, this defendant prays:

1. That the relief prayed for against this defendant in each and all of the said paragraphs of prayer of this second amendment and supplement to the Bill of Complaint be denied, and that plaintiff's bill of complaint be dismissed as to it.

2. That in the decree and judgment entered in this case it be allowed its costs in this action and all other proper relief agreeable to equity and good conscience.

(Acknowledgment of Service.)

Filed
Jan. 11,
1939.

318 And afterwards, to wit, at the November Term of said Court, on the 11th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the defendants City of Indianapolis, et al., by their attorneys, and file separate answer to second amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

319 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

SEPARATE ANSWER OF CITY OF INDIANAPOLIS
ET AL. TO SECOND AMENDMENT AND SUPPLEMENT
TO PLAINTIFF'S BILL OF COMPLAINT.

City of Indianapolis, a municipal corporation, and the named members of its Board of Directors and of its Board of Trustees for Utilities (hereinafter for convenience sometimes referred to collectively as defendant City), for separate answer to the Second Amendment and Supplement to Plaintiff's Bill of Complaint, and referring to the numbered paragraphs thereof, say:

26. They admit the averments contained in Subdivision 26 thereof, but allege that defendant City did not accept the tendered transfer and assignment of the leasehold estate created by the lease of September 30, 1913; that said lease has never been binding and is not now binding upon defendant City or its property; and that the execution of the indemnifying agreement to Citizens Gas Company (Exhibit J to said Bill) in no sense was or is a recognition of liability under said lease, nor an acceptance of it; nor did or could the benefits of such agreement validly extend to said plaintiff, nor can plaintiff enforce the same, directly or indirectly.

320 27. They admit the deposit of \$1,157,785 with The Indiana National Bank of Indianapolis in pursuance of the agreement dated March 2, 1936 (Exhibit H to the Bill); admit the payment of insurance premiums on prop-

erty of The Indianapolis Gas Company and the payment of Indiana gross income taxes and Federal income taxes assessed against The Indianapolis Gas Company, all since September 9, 1935, and all under and by virtue of said agreement dated March 2, 1936, and not otherwise. They deny that such payments were made under or by reason of said lease of September 30, 1913. They deny that the sums so paid were paid from proceeds of the operation of the property covered by said lease exclusively. They admit that defendant City has not paid, and allege that defendant City is not under any circumstances liable for, all or any part of interest on bonds issued by The Indianapolis Gas Company; and leave plaintiff to its proof as to who, if anyone, has paid interest upon such bonds. They allege defendant City is not liable for payment of such interest for the reasons and by reason of facts heretofore pleaded by defendant.

28. They deny that defendant City is in default in the payment of interest on bonds of The Indianapolis Gas Company and allege that for reasons and upon facts heretofore pleaded, defendant City is not and could not be liable for such interest by reason of such bonds or said lease. They deny that the transfer of i - property by Citizens Gas Company to said City on September 9, 1935, was fraudulent as to plaintiff or as to plaintiff's bondholders or to any person; and they deny that such transfer was made or received with intent to hinder, delay or defraud plaintiff or its bondholders or any person; and they deny that plaintiff is entitled to have such transfer set aside or declared fraudulent and deny that property so transferred may be subjected to judgments as 321 prayed. They deny that any obligations of said lease were or are enforceable or valid against defendant City; deny that any obligations of said lease were or are enforceable or valid since September 9, 1935; and deny that defendant City received said property with knowledge that such lease obligations were valid or enforceable against it or its property or against any one subsequent to September 9, 1935. They allege that the said transfer and conveyance were made pursuant to a legal duty imposed upon said Citizens Gas Company, and by virtue of a legal right vested in said City. They allege that said transfer and conveyance were made in the performance of a public charitable trust, whereby defendant City was substituted in possession as a successor trustee to defend-

ant Citizens Gas Company; all consistently with the terms of such public charitable trust.

29. They admit defendant City is now the owner and holder, as a part of said public charitable trust, of bonds of The Indianapolis Gas Company in the aggregate principal amount of \$18,000, transferred to defendant City by Citizens Gas Company; and they deny that there are any reasons why such bonds should not participate in any distribution of funds payable by way of principal or interest on such bonds, equally and ratably with all other bondholders excepting only as to bonds issued and now held by said The Indianapolis Gas Company in the aggregate principal amount of \$120,000; as to which defendant City is informed and believes and upon information and belief alleges the fact to be that such bonds are subject to extinguishment and should be cancelled and not allowed to participate equally and ratably with other bonds.

30. They deny that defendant City has refused or neglected or has ever been or is now under any obligation to make or cause to be made, renewals, repairs, 322 replacements, or extensions of property owned by

The Indianapolis Gas Company and covered by said lease, excepting only to the extent if any that some obligation is imposed by said agreement of March 2, 1936. They deny that defendant City is liable to plaintiff as Trustee under a mortgage of property covered by said lease to any extent and for any sum, whether for losses, damages, costs, charges, or expenses, resulting from alleged failure of defendants or any of them to make or cause to be made any such renewals, repairs, replacements, or extensions. With respect to the obligations and performance or non-performance thereof imposed by said lease or by said mortgage, on The Indianapolis Gas Company or Citizens Gas Company, these defendants leave plaintiff to strict proof, as not having sufficient knowledge with respect thereto. They allege that no such claimed liability is assertable that has accrued more than ten years prior to the date of plaintiff's said Second Amendment and Supplement. They allege that any controversy with respect to claimed under-maintenance, viz., alleged failure to make or cause to be made renewals, repairs, replacements or extensions by reason of said lease, is a separable controversy to which The Indianapolis Gas Company is an indispensable party and is opposed in interest to defendant City; that as to this

controversy, the parties should be realigned, and when realigned, there is no jurisdiction over such separable controversy because of lack of diversity of citizenship; jurisdiction being collusively invoked.

31. They deny any obligation under or by virtue of the said lease of September 30, 1913. They have no knowledge and leave plaintiff to strict proof of the facts alleged in said subdivision 31 of said Second Amendment and Supplement to its Bill of Complaint.

323 Wherefore, these defendants specifically deny that plaintiff is entitled to any and all of the relief prayed; and they renew the prayer of their counterclaim.

Edward H. Knight,
Corporation Counsel of Indianapolis.

M. B. Reddington,
City Attorney of Indianapolis.

W. H. Thompson,

Albert L. Rabb,

Solicitors for said Defendants.

324 And afterwards to wit at the November Term of said Court, on the 14th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Filed
Jan. 14,
1939.

On oral application of plaintiff, The Chase National Bank of the City of New York, Trustee, it is hereby given leave to withdraw its answer to the counterclaim of defendants, City of Indianapolis, et al., and to file its motion to strike immaterial matter from the answer and counterclaim of defendants, the City of Indianapolis, et al. Said motion is now filed and reads as follows:

325 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1844) • •

MOTION TO STRIKE IMMATERIAL MATTER FROM
THE ANSWER AND COUNTERCLAIM OF DE-
FENDANTS, THE CITY OF INDIANAPOLIS, ET
AL.

Now comes the plaintiff, The Chase National Bank of the City of New York, Trustee, by its attorneys, and respectfully petitions the Court for leave to withdraw its

answer to the counterclaim of defendants, the City of Indianapolis, the members of the Board of Trustees for Utilities of said City, and the members of the Board of Directors for Utilities of said City, and moves the Court for an order striking out the following portions of the separate and several answer and counterclaim of said defendants, making this motion separately as to each of said portions, on the ground that each and every such portion of said answer and counterclaim, whether such portions are taken separately or collectively, is immaterial to the determination of any issue in this cause:

1. That portion of the last grammatical paragraph of part 5 of said answer which reads:

“also contains many other conditions burdensome in character”

(which language appears in the 14th, 15th and 16th lines of page 8).

326 2. That portion of sub-paragraph “Second” of part 8 of said answer which reads:

“which lease contained onerous and burdensome conditions,”

(which language appears in the 31st and 32nd lines of page 15).

3. That portion of part 11 of said answer which reads:

“These answering defendants further aver that The Indianapolis Gas Company has during all of said time received the rentals due it under the terms of said lease; that the Citizens Gas Company of Indianapolis has paid all taxes in connection therewith and all other burdens imposed upon it by the terms of said lease, and that the payments so made to or in behalf of The Indianapolis Gas Company during the period from 1913 to 1935, inclusive, were as follows:”

(which language appears on page 24).

4. The table of payments included in part 11 of said answer, which table appears on page 25 of said answer.

5. That portion of the last grammatical paragraph of part 11 of said answer which reads:

“deny that over the period of the lease any profits have been produced thereby and”

(which language appears in the 4th and 5th lines of page 26).

6. That portion of the last grammatical paragraph of part 11 of said answer which reads:

“On the contrary, these answering defendants aver:

“(a) That the payments made to The Indianapolis

Gas Company during the period of years above referred to, viz.: from 1913 to 1935 were largely in excess of the fair value of the use of said property during said time.

“(b) That during many of the years referred to Citizens Gas Company was operated at a loss and one of the factors contributing materially to the existence of such loss was the excessive rental and other considerations required to be paid to and on behalf of said The Indianapolis Gas Company under the terms of said lease.

“(c) That said lease is presently burdensome and not advantageous to said trust property, all as herein-
327 after in subdivision 27 hereof more specifically alleged.

“(d) That the bondholders and stockholders of The Indianapolis Gas Company have benefited to an inequitable, unfair and unreasonable extent because of payments made to them or on their behalf under the terms of said lease.”

(which language appears on page 26).

7. That portion of part 21 of said answer which reads:

“and that the benefits of The Indianapolis Gas Company largely exceeded the benefits to the City of Indianapolis;”

(which language appears in the 7th, 8th and 9th lines of page 51).

8. All of paragraph “Fourth”, including sub-paragraphs (a), (b) and (c) of said paragraph “Fourth”, and all of paragraph “Fifth” of part 27 of said answer, (which paragraphs and subparagraphs appear on pages 61-62).

9. All of paragraph “Fourth,” including sub-paragraphs (a), (b) and (c) of said paragraph “Fourth”, and all of paragraph “Fifth” of said counterclaim, (which paragraphs and subparagraphs appear on pages 69-70).

Dated: January 13th, 1939.

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.
William L. Taylor,
State Life Building,
Indianapolis, Indiana.

Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Taylor & Carter,
Of Counsel.

Entered 328 (Further Entry for January 14, 1939.)
Jan. 14,
1939.

Said motion to strike having been filed and having been submitted for the consideration of the Court, and the Court being fully advised, it is hereby ordered that said motion be and the same is hereby overruled, to which ruling the plaintiff excepts.

Upon the overruling of said motion, plaintiff, The Chase National Bank of the City of New York, Trustee, is hereby given leave to refile its answer to the counterclaim of defendants, the City of Indianapolis, et al., which answer was previously filed on November 14, 1936, and said answer is refiled and reads as follows: (H. I.)

Filed 329 And afterwards towit at the November Term of said
Jan. 18,
1939. Court, on the 18th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the answering defendants by their attorneys, and file motion for leave to amend one paragraph of defendants' answer, which motion is granted by the Court and is as follows: (H. I.)

And said answering defendants now file amendment and supplement to their answer and counterclaim, which is as follows:

330 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844.) *

AMENDMENT AND SUPPLEMENT TO ANSWERING DEFENDANTS' ANSWER AND COUNTERCLAIM.

The answering defendants by leave of court first had and obtained file this their amendment and supplement to their answer and counterclaim heretofore filed in this cause. (This amendment will follow the averments of answering defendants subdivision numbered 9 on page 20 of their answer.)

These answering defendants aver that at no time has the City of Indianapolis through the Board of Public Works or otherwise formally, or in any other manner, accepted the lease by requiring extensions in the lines and mains of The Indianapolis Gas Company to be made, nor

has said City through said Board of Public Works or otherwise ever in any manner recognized or ratified said lease by requiring extensions in lines and mains of The Indianapolis Gas Company to be made, although the answering defendants admit that the City of Indianapolis through the Board of Public Works thereof did require extensions 331 to be made in the lines and mains of The Indianapolis Gas Company.

Edward Knight,
Corporation Counsel.
Michael B. Reddington,
City Attorney of Indianapolis.
William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
Solicitors for Answering Defendants.

332 (Further Entry for January 18, 1939.)

Entered
Jan. 18,
1939.

This matter came on to be heard upon this day upon the question of the advisability of hearing and determining the issue presented as to whether or not the obligations contained in the lease between the Indianapolis Gas Company and Citizens Gas Company of Indianapolis, dated September 30, 1913, are binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or the Citizens Gas Company of Indianapolis.

And the Court being duly advised in the premises:

It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis, or any of the property acquired by it from the Citizens Gas Company of Indianapolis, on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith

but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the
 333 ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any of all issues to a Master.

It is further ordered that the assignment of this cause for trial upon the above stated issues for Monday, February 20, 1939, at 10:00 A. M. be, and the same is, hereby vacated and this cause is ordered reassigned for trial of such issues on Thursday, March 2, 1939, at 10:00 A. M.

Entered
 Mar. 2,
 1939.

334 And afterwards to wit at the November Term of said Court, on the 2nd day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It appearing to the Court that Alfred M. Glossbrenner, who was made a defendant to plaintiff's bill of complaint as a member of the Board of Trustees for Utilities of the City of Indianapolis has died, that Thomas D. Sheerin has succeeded said Alfred M. Glossbrenner as such member of said Board of Trustees, that Joseph H. McDuffee, who was made a defendant in this cause as a member of the Board of Directors for Utilities of the City of Indianapolis, is no longer a member of said Board of Directors, and that John E. Ohleyer has succeeded said Joseph H. McDuffee as such member of said Board of Directors;

It is ordered that said Thomas D. Sheerin, as a member of the Board of Trustees for Utilities of the City of Indianapolis, and said John E. Ohleyer, as a member of the Board of Directors for Utilities of the City of Indianapolis, be, and they hereby are made parties defendant in this suit and this suit shall proceed.

And now Thomas D. Sheerin and John E. Ohleyer through their solicitors, William H. Thompson and Albert L. Rabb, enter their appearance in this cause and adopt

the pleadings heretofore filed in this cause by their respective predecessors in office as and for their own, with the same force and effect as though they had originally joined in filing the same.

526 And afterwards towit at the May Term of said Court, on the 30th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Filed
Oct. 30,
1939.

Comes now the plaintiff by its attorneys, and files official reporter's transcript of proceedings upon trial, which is as follows:

528 IN THE DISTRICT COURT OF THE UNITED STATES,
for the Southern District of Indiana,
Indianapolis Division.

| | |
|---|---------------------------|
| The Chase National Bank of the City of New York, Trustee, <i>Plaintiff,</i> | } In Equity, No. 1844. |
| <i>vs.</i> | |
| Citizens Gas Company of Indian- apolis, a Corporation, et al., <i>Defendants.</i> | } In Equity, No. 1950. |
| Massachusetts Mutual Life Insur- ance Company, et al., <i>Plaintiffs,</i> | |
| <i>vs.</i> | |
| Citizens Gas Company of Indian- apolis, et al., <i>Defendants.</i> | |

OFFICIAL REPORTER'S TRANSCRIPT OF PRO-
CEEDINGS UPON THE TRIAL.

Indianapolis, March 2, 1939.

529 Be It Remembered, That, in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on Thursday, March 2, 1939, commencing at ten o'clock in the forenoon, the above-entitled causes, being at issue, came on for trial before the Honorable Robert C. Baltzell, sole Judge of

said Court, and the proceedings upon the trial were in the words and figures following, to-wit:

Appearances:

The Plaintiff, The Chase National Bank of the City of New York, Trustee, appeared by Howard F. Burns, Esq., and John Adams, Esq., representing Messrs. Baker, Hostetler & Patterson, by William L. Taylor, Esq., and Thompson Kurrie, Esq., representing Messrs. Taylor & Carter, and by Hugh L. M. Cole, Esq., representing Messrs. Milbank, Tweed & Hope, its attorneys.

530 The Plaintiffs, Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and The Savings Bank of Baltimore, appeared by Howard F. Burns, Esq., and John Adams, Esq., representing Messrs. Baker, Hostetler & Patterson, and by Harvey J. Elam, Esq., representing Messrs. Fesler, Elam, Young & Fauvre, their attorneys.

The Defendant, Citizens Gas Company of Indianapolis, appeared by William G. Sparks, Esq., representing Messrs. Davis, Pantzer, Baltzell & Sparks, its attorneys.

The Defendant, The Indianapolis Gas Company, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, and by William R. Higgins, Esq., representing Messrs. McTurnan & Higgins, its attorneys.

The Defendant, The Indiana National Bank of Indianapolis, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, its attorneys.

The Defendants, City of Indianapolis, a municipal corporation, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, appeared by William H. Thompson, Esq., Albert L. Rabb, Esq., and Patrick J. Smith, Esq., representing Messrs. Thompson & Rabb, their attorneys.

531 The Court: Call the case.

The Clerk: The Chase National Bank against Citizens Gas Company of Indianapolis and others.

The Court: Is the plaintiff ready?

Mr. Burns: Yes.

The Court: Is the defendant ready?

Mr. Thompson: Yes, your Honor, but before we commence the actual trial of this case, I have two motions to suppress subpoenas duces tecum that were issued, one on Tuesday at four o'clock and one on yesterday at three-twenty o'clock.

I would be glad to present that matter briefly to your Honor, if I may.

Mr. Burns: If the Court please, the Clerk called only the case of The Chase National Bank against Citizens Gas Company, No. 1844. It was our understanding that the Court made an order that both cases—that is, both 1844 and 1950—were to be tried at this time. Am I correct?

The Court: I understand that the evidence will be 532 heard which would be applied to both cases and, then, we would apply it to the case to which it belongs.

Mr. Burns: Yes.

The Court: There was no order of consolidation.

Mr. Burns: No, I think they were simply to be heard together.

Mr. Thompson: That is our understanding.

The plaintiffs, to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

533 Mr. Burns: If I may stand over here by the court reporter, it will help in identifying some of these exhibits.

The parties have, with much labor and some difference of opinion, though I guess perhaps no difference of opinion on the final results, agreed on a stipulation covering a substantial part of the facts in this case. The bills in the two cases are in a large measure identical, and the stipulation has been drawn so that Paragraph 1 of the stipulation is referable to the facts stated in Paragraphs 1 of the two bills and Paragraph 2 of the stipulation is referable to the facts stated in Paragraphs 2 of the two bills; and that scheme is followed down through the first seventeen paragraphs of the stipulation. Beyond the seventeenth paragraph of the bills, the allegations perhaps got to be more argumentative than matters of fact, so beginning with Paragraph 18 of the stipulation it does not follow in accordance with the paragraphs of the bills.

The Court: Suppose you have that identified as an exhibit, and shown read in evidence.

Mr. Burns: Yes. Since evidence is being introduced here in both cases, in the Trustee's case, 1844, and in the Bondholders' case, 1950, may we have a general understanding that in the absence of some express statement to the contrary all of the evidence offered is being introduced in both cases, and as counsel for plaintiff in both cases we will refer to the evidence and the exhibits offered as the plaintiffs' evidence or the plaintiffs' exhibits, as the term being intended to include both the Trustee and the Bondholders.

The Court: There is no objection to that, as I understand. My recollection is that we stated we would make a finding in the Trustee case first. I do not know that the record shows that, but that is what I had in mind, that I would decide that case, and that would perhaps not necessitate deciding the question of whether or not the Bondholders had a right to bring a suit. That was my understanding of it.

Mr. Burns: Plaintiffs wish to have marked for identification three documents:

First, as Plaintiffs' Exhibit 1, a stipulation signed by counsel for all parties to these cases.

Second, as Plaintiffs' Exhibit 2, the printed record 535 in the United States Circuit Court of Appeals, in the case of Newton Todd, appellant, against Citizens Gas Company of Indianapolis, et al., appellees, Cause No. 4394.

And, third, as Plaintiffs' Exhibit 3, the appellants' brief in the Supreme Court of Indiana in case No. 26,163, entitled Anna G. Williams, as etc., appellants, versus Citizens Gas Company of Indianapolis, et al., appellees.

The three exhibits mentioned are merely marked for identification at this time.

Mr. Thompson: Is your offer in respect of Exhibit No. 3 limited to the pleadings?

Mr. Burns: At the present time I am simply asking to have it marked for identification, and not offering any of the three exhibits.

(Plaintiffs' Exhibits 1, 2 and 3 were marked for identification by the reporter.)

Mr. Burns: Plaintiffs offer in evidence the following parts of the stipulation heretofore identified as Plaintiffs' Exhibit No. 1:

536 The five grammatical paragraphs which are introductory thereto.

Numbered sections 1 to 17, both inclusive, of said stipulation.

Numbered sections 19, 20 and 21 of said stipulation.

Numbered sections 23, 24 and 25 of said stipulation.

The Court: That omits 22?

Mr. Burns: That omits 22, and we are offering just a part of 18, which I will come to in a minute.

Also subparagraphs I, II, IX, X, XIII and XIV of numbered section 18 of said stipulation.

We are offering all of the paragraphs of the stipulation except Paragraph 22 and except parts of Paragraph 18.

The Court: That is, all of the stipulation with these exceptions, is that right?

Mr. Burns: Yes. There are only 25.

Mr. Thompson: I want to make an objection to the offer of Plaintiffs' Exhibit 1, your Honor, but I would like 537 to make it in connection with Exhibits 1, 2, and 3, if they are to be offered now.

Mr. Burns: I am going to offer a whole lot of things, and if it is agreeable to the court, I will finish the offer with regard to this stipulation, and then let Mr. Thompson make what objections he cares to, if that is agreeable to counsel and the court.

The Court: All right, go ahead.

Mr. Burns: Plaintiffs offer as evidence in both cases the following exhibits attached to the bill as amended and supplemented in the Trustee's case and identified in the stipulation:

EXHIBITS A TO F, both inclusive, and EXHIBITS H AND J.

Plaintiffs offer in evidence in both cases EXHIBITS A AND B attached to the City's answer in the Trustee's case and identified in the stipulation.

The Court: That is attached to—

Mr. Burns: (Interposing.) The City's answer in the Trustee's case. Perhaps I got that wrong. Exhibits A and B attached to the City's answer in the Trustee's case.

Plaintiffs offer EXHIBITS 5 TO 9, both inclusive, 538 20, 22, 23, 24, 47 TO 50, both inclusive, 55, 56, 86 AND 87, identified in the stipulation.

(The reporter marked for identification Plaintiffs' Exhibits 5 to 9, both inclusive, 20, 22, 23, 24, 47 to 50, both inclusive, 55, 56, 86 and 87, identified in the stipulation.)

Mr. Burns: I might say parenthetically, if the court please, that the last paragraph of the stipulation indicates a large number of the exhibit numbers were not used. We

began with 1, and we found that we were taking out these exhibits and putting in others, so there are a large number of exhibit numbers not used, and those are enumerated in the last paragraph of the stipulation.

Plaintiffs offer the following exhibits identified in the stipulation, each of which is a pleading in the Fishback, Todd, or Williams case. Said exhibits are offered for the purpose of showing the questions raised and issues presented in those suits and the positions taken by the various parties in said suits, but said pleadings are not offered as any independent evidence of the facts stated in the several pleadings:

539 The exhibits so offered are as follows:

EXHIBITS 13 AND 14, being certain pleadings in the Fishback case.

EXHIBITS 30, 31, AND 32, being certain pleadings in the Todd case.

EXHIBITS 35 TO 40, both inclusive, being certain pleadings in the Williams case.

EXHIBITS 13, 14, 37, 39, AND 40, just referred to, have been separately typewritten and appear among the typewritten exhibits tendered with the stipulation.

EXHIBIT 30, the bill of complaint in the Todd case, appears on pages 2 to 72, both inclusive, of the printed record in the Todd case, previously identified as Exhibit 2.

Mr. Thompson: Are you offering that?

Mr. Burns: Yes.

The Court: Can you furnish Mr. Thompson a copy of what you have just handed to the court, showing these offers?

Mr. Burns: Yes. Exhibit 31, the answer of the City of Indianapolis and others in the Todd case, appears on pages 115 to 152, both inclusive, of said record in the 540 Todd case, (Exhibit 2) and Exhibit 32, an amended motion to strike out portions of answers, appears on pages 154 to 161, both inclusive, of said record in the Todd case (Exhibit 2).

Mr. Thompson: In the interest of time, this might be handed to the reporter.

Mr. Burns: I have handed it to him, but I have to have these exhibits marked as we go along.

Exhibit 35, the complaint in the Williams case, appears on pages 119 to 228, both inclusive, of the appellants' brief in said cause, previously identified as Plaintiffs' Exhibit 2.

Exhibit 36, the supplemental complaint in said Wil-

liams case, appears on pages 228 to 230, both inclusive, of said appellants' brief (Exhibit 3).

Exhibit 38, the demurrer of the Citizens Gas Company and others in said Williams case, appears on pages 232 to 235, both inclusive, of said appellants' brief (Exhibit 3).

The Court: Unless you are going to use this immediately, why couldn't the reporter take this and mark the exhibits during recess?

Mr. Burns: That will be satisfactory.

The Court: And you may look it over, Mr. Thompson, and if you have any objections to any part of it, that can be taken up later.

(The reporter marked for identification Plaintiffs' Exhibits 13, 14, 30, 31, 32, 35 to 40, both inclusive.)

541 Mr. Burns: I now offer EXHIBITS 13, 14, 30, 31, 32, AND 35 TO 40, inclusive, which I have just referred to, being the pleadings in those various causes. I mention that again so as to give Mr. Thompson a chance if he wants at this time to make an objection to those various pleadings,—or, would you prefer to wait?

Mr. Thompson: I would prefer to wait until you have made this complete offer, and then I will state my objections, if that is satisfactory to your Honor.

The Court: Yes.

Mr. Burns: Plaintiffs also offer certain letters identified in the stipulation as EXHIBITS 58, 59, 66, 67, 75 AND 76, but said letters are offered only for the purpose of showing the positions taken by the various parties in writing said letters, and that said positions were called to the attention of the recipient of such letters, but not as being any independent evidence of the facts stated therein.

Copies of these Exhibits 58, 59, 66, 67, 75 and 76 have been prepared by Mr. Thompson's office, but they do not show the signatures on the letters, and I would like
542 some way to have them appear. That is, many of them were made from carbon copies of letters, and if we could have some arrangement to have those signatures filled in, so that we might know who had written the letters, it would make it complete. Could you do that, Mr. Rabb?

Mr. Rabb: I do not have custody of the Indianapolis Gas Company files.

Mr. Burns: I understood we were going to have complete exhibits here.

Mr. Rabb: We gave you our complete files and photo-

stats. We do not have the originals. They were, in the main, in the Indianapolis Gas Company's custody.

Mr. Burns: I think the letters should be complete, and we will undertake to complete these six we are offering, but we will not endeavor to complete the others somebody else may offer, but will call a witness to prove whose the signatures were.

The Court: If any of the parties have the originals, I am certain they will furnish them.

Mr. Higgins: We will furnish the ones that were submitted to us.

Mr. Burns: I have here in my hand certified copies 543 from the Recorder of Marion County, Indiana, of the transfer and assignment of personal property identified as Exhibit E, attached to the bill, and already introduced in evidence in connection with the stipulation; the assignment of the 99-year lease, Exhibit F, attached to the bill, and already identified in connection with the stipulation; and the deed of the real estate, Exhibit 55, previously identified and offered in connection with the stipulation. It does not seem to me there is any necessity of offering these certified copies. They show—

The Court: (Interposing.) Have you offered the copies?

Mr. Burns: I have offered the copies, but I wanted to show the fact about the recording. I thought perhaps rather than calling the Recorder we could have a stipulation here. We were unable to stipulate on it between the parties when we tried to stipulate on it in advance. These certified copies show each of them recorded at 3:45 p. m., September 9, 1935. I am advised by the Recorder and by 544 counsel learned in the law in this vicinity that that means the time the documents were received for record by the Recorder. If it can be so stipulated, I think it will be unnecessary to offer these certified copies.

The Court: I think you can stipulate that.

Mr. Thompson: For the City of Indianapolis, we will agree the instruments to which Mr. Burns has just referred were presented to the Recorder of Marion County, Indiana for recordation at 3:45 p. m., on the 9th day of September, 1935.

The Court: And that they were recorded in certain volumes.

Mr. Thompson: And that they were thereafter properly recorded.

Mr. Burns: Is that agreeable to the Citizens Gas Company?

Mr. Sparks: Yes.

Mr. Burns: And the Indianapolis Gas Company?

Mr. Higgins: Yes.

Mr. Burns: It seems to me that saves encumbering the record with these certified copies.

Plaintiffs offer as Exhibit 88 a statement of the Secretary of the Public Service Commission of Indiana, 545 duly certified by the Secretary of State, showing that the Secretary of the Public Service Commission, after diligent search, has been unable to find the pleadings before the Public Service Commission referred to in sections 7 and 8 of the bill. In view of the loss of those original pleadings, plaintiffs offer Exhibit 13, the first paragraph of the complaint of Frank S. Fishback case, as independent evidence of the three following matters:

1. Petition of Citizens Gas Company of Indianapolis and Indianapolis Gas Company before the Public Service Commission asking for an order authorizing the making of a lease between Indianapolis Gas Company and Citizens Gas Company.

2. The intervening petition of Frank S. Fishback before the Public Service Commission opposing the approval of the lease.

3. The petition of Frank S. Fishback before the Public Service Commission for rehearing.

Mr. Thompson: The defendant, City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, 546 object at this time to the offer of Exhibit No.

13 for the reason that there is no showing at all that the petition of the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company before the Public Service Commission, the intervening petition of Frank S. Fishback, and the alleged petition of Fishback for a rehearing, set out in the first paragraph of plaintiffs' complaint are correct, accurate and true copies of the pleadings that are actually filed before the Public Service Commission. Note, your Honor, these are offered as evidence of the things that were actually filed before the Public Service Commission.

Secondly, on the ground that these are hearsay as to the objecting defendants.

Third, on the ground they cannot be received as original evidence of the papers that were actually filed, without some proof that they are correct copies of such papers.

Mr. Burns: As I understand it, under the stipulation,

Exhibit 13 is here before the court with just as much effect as though we had subpoenaed the transcript from the Supreme Court of Indiana and proved Exhibit 13 from 547 the transcript. That is where we got the information, and what it was compared with.

The Court: I understand Mr. Thompson's position that he is not objecting to that, but the fact that the things stated in there constitute the things that were filed before the Public Service Commission,—which, of course, would be elementary.

Mr. Burns: The petition of Fishback in the Circuit Court, removed to the Superior Court, was verified, and was then certified by the Clerk of the Superior Court to the Supreme Court, and it is that on which we rely as our evidence.

The Court: You do not contend that would be evidence because it was filed before the Commission?

Mr. Burns: The petition purports to set forth in detail and quote exactly what those petitions are. There is a well settled exception to the hearsay rule that a declaration as to matters of great public interest is admissible where the original source of information is no longer available. I think this court knows from his previous contact with this situation that there wasn't anything in and about Indianapolis in 1913 about which there was so much public 548 interest as about this gas situation. It was a topic of constant discussion in the newspapers, and Fishback comes into the Circuit Court and files what purports to be a statement of what his pleadings were before the Public Service Commission. Now, we contend that that comes within the well accepted exception to the hearsay rule, that if the primary sources of evidence are unavailable, hearsay declarations are admissible to prove the fact which otherwise cannot be proved.

This question, I ought to say, is typical of several questions that are necessarily involved here, and they are inherent in the situation because the City of Indianapolis delayed twenty-two years before it raised any question whatever about the validity of the lease.

The Court: Let us not go into that. We are just trying a law suit, and I don't care to be harassed by things that are personal in this. I am interested in the facts and the law. They filed it within the required time. You don't have to file anything the next day; you can file it within limits. It was all right, and the Circuit Court of Appeals said so; so I don't see any point to that.

549 I am doubtful very much whether or not that document should be received as evidence of documents that were filed with the Public Service Commission. I will reserve my ruling on that, however, until I have an opportunity to examine it further. It would be evidence, of course, of what was in the petition filed by Fishback, but to say that would be evidence of the things that were in the statements, allegations that are in the pleadings or papers filed with the Public Service Commission, I am just doubtful if I could go that far, but I will reserve my ruling on that.

Mr. Burns: Plaintiffs also offer Paragraph 13 of the bill of complaint in the Todd case appearing upon pages 40 and 41 of Exhibit 2, and Paragraph 10 of the answer of the City of Indianapolis and others appearing on page 126 of Exhibit 2, to establish the admission made by the City of Indianapolis in its answer as to the circumstances under which Chapter 78 of the Indiana Laws of 1929 was prepared and passed. We are offering an allegation in the bill and an admission in the City's answer as an admission of the facts there stated.

Mr. Thompson: To which evidence the City of Indianapolis and the Member of the Board of Directors for 550 Utilities object, because it is perfectly clear an averment in the bill of complaint in the Todd case or an admission contained in the answer of the City of Indianapolis are limited, so far as any legal questions are concerned, to that case. Here is an issue made between the City of Indianapolis and Newton Todd, the plaintiff, as to whether Newton Todd as representing the stockholders of the Citizens Gas Company is entitled to take this property over or whether a public charitable trust had been created by which title to that property was vested in the City of Indianapolis at the date of the creation of the trust, which was 1905. Certain averments are made in that bill of complaint, and certain answers in respect thereto by the City of Indianapolis. That is not offered now on the question of res adjudicata, but is offered as an independent admission in this case, and I think it is well settled any admission made by any party in a pleading in a case is limited to that case.

The Court: I do not know what the allegations are.

Mr. Burns: These allegations are allegations of fact that the law was prepared by counsel for the City of 551 Indianapolis who was acting for it in connection with this, that it was introduced in the Legislature at the

request of the City of Indianapolis, that it was passed exactly as it was introduced.

The Court: Is that with reference to that special enabling statute?

Mr. Burns: Yes.

Mr. Thompson: I will add the objection, which Mr. Burns brings to my mind, that all of this could not make any difference whatever. If an act is passed the court is not to examine the circumstances and conditions under which it was passed; it is either a valid statute or it isn't. What possible difference could it make in the determination of this case whether the enabling act, Chapter 78 of the Laws of 1929 was passed by the General Assembly in the exact form it was prepared, or whether the Legislature made a change in it?

Mr. Burns: It certainly cannot make any difference in the law, but it is material in considering the intention of the City of Indianapolis. Within about a week or ten days after the law was passed, the City, by its Board of Works, exercised its option to take over the Citizens Gas, and
552 I think that is material and has a bearing on—

The Court: (Interposing.) I realize this goes back a long ways, and the evidence necessarily covers various ramifications, and I am going to be very liberal in my rulings as to the admission of evidence. I think the Court wants everything before it that will shed any light on the questions to be determined, and I would rather err on having a little more in the record than not having enough. I am making that as a general statement that will apply to all. I will not pass on that question now.

Mr. Burns: If the Court would like for us to do so, we can cite decisions of the Supreme Court and other courts, holding that admission by a party is admissible as to that same party in entirely independent litigation. It is a very well settled rule.

The Court: I would like to take up these exhibits all at the same time and go right down through them. I can't do it very well piecemeal. Perhaps we can get along better if we make all of these offers and then begin at the beginning and make your objections, and we can rule
553 on them as we go along, or take them under advisement, and I think that would be a little more practical.

Mr. Burns: Plaintiffs offer as Exhibit 89 the second, third, and fourth grammatical paragraphs from Section 18 of the answer of City of Indianapolis and others in the case of Cotter, et al, versus Citizens Gas Company, et al., being Case No. 1192 on the equity docket of this court, as evi-

dence that the City of Indianapolis and the Board of Public Works in said case admitted, among other things, that the Citizens Gas Company leased all the plant and property of Indianapolis Gas Company for a period of 99 years with the full consent and approval of the City of Indianapolis.

The Court: I wonder if we might just let these stand on their offer at the present time, and unless it is necessary to have them passed upon, until we go ahead with the other evidence of the plaintiff, and take this all up at the conclusion of the evidence, if we can, unless some particular part of it would be necessary; and I would say we can pass on all of it before the defendant proceeds with its evidence.

554 Mr. Thompson: I have reduced my objections to print on the major portion of these. If the Court would rather, I will take it up later.

The Court: Yes, if there is no objection to that procedure.

Mr. Burns: I would like to say in regard to Exhibit 89, which I have just referred to, I asked Mr. Sogemeier to produce the original files of the Court in the Cotter case so if objection arises from the fact it is merely a copy, we would be glad to take it from the record.

The Court: No. We are not in the habit of having lawyers misrepresent anything in making copies.

Mr. Burns: I think I missed one in there in reading this offer.

Plaintiffs offer Paragraph 4 of the stipulation of facts in the Todd case appearing on pages 192 and 193 of Exhibit 2, as evidence that the parties to said cause, including the Citizens Gas Company and the City of Indianapolis, stipulated that the Citizens Gas Company of Indianapolis was then the owner of a 99-year lease created by the lease of September 30, 1913 here in question.

555 Mr. Thompson: I haven't been furnished copies of these last two.

The Court: Pages 4 and 5, you mean, Mr. Thompson?

Mr. Thompson: The last one, on page 5. You see, your Honor, he comes here with an offer of isolated portions of a stipulation of facts and three grammatical paragraphs from Section 18 of an answer. I think it is perfectly obvious I cannot tell from looking at these just what these are, and I don't know whether the context is given so it is understandable, and I won't until—

The Court: (Interposing.) We will give you an opportunity to examine them. I haven't seen a copy yet of the

stipulation that was offered. Do you have that stipulation, Exhibit 1?

(Exhibit No. 1 was handed to the Court.)

(At this point the witnesses in the cause were sworn.)

Mr. Burns: I will call Mr. Vonnegut.

556 FRANKLIN VONNEGUT, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Vonnegut, will you state your name?

A. Franklin Vonnegut.

Q. And your address?

A. 120 East Washington Street, for business.

Q. And your occupation?

A. President of the Vonnegut Hardware Company.

Q. Are you now a member of the Board of Directors of the Citizens Gas Company?

A. I am.

Q. During what time have you been a director of the Citizens Gas Company?

A. From the inception.

Q. That is, from about 1905 to the present time?

A. Correct.

Q. And have you been active in other respects? Have you been an officer of the Citizens Gas Company as well as a director?

A. I was the President for a number of years.

Q. Can you tell me during what years you were President?

A. I cannot.

Q. Have you held some other office than President?

A. Not in the Citizens Gas Company.

Q. Not in the Citizens Gas Company?

A. Director, only.

Q. Director and President?

557 A. Director and President.

Q. You don't recall during what years you were President?

A. I only know that I was requested not to ask for the office when I was not in harmony with Mr. J. D. Forrest, our manager.

Q. During what period of time was Mr. J. D. Forrest with the Citizens Gas Company?

A. All the time.

Q. Well, do you mean he came in 1905?

A. Yes, sir.

Q. And stayed with the Citizens Gas Company until what time?

A. Until it was turned over to the City of Indianapolis.

Q. Well, now, wasn't there a time, shortly before the property was turned over to the City of Indianapolis, that the Citizens Gas Company had some other manager?

Mr. Burns: Mr. Kemp was his name?

A. I don't recall it.

A Voice: Mr. Kirk.

Mr. Thompson: Mr. Forrest retired and Mr. Kirk went in long before the time that the City took over the 558 property.

A. (Continued.) Oh, sure—Mr. Kirk. I knew that he was the manager, but I didn't catch the connection suddenly.

Q. You have a little difficulty with your hearing?

A. A little—a lot of it.

Q. Do you recall, now, when Mr. Kirk succeeded Mr. Forrest?

A. I didn't prepare myself to be a witness. I didn't look up anything and my memory isn't such that I can give any dates.

Q. During the time when Mr. Forrest was with the company, what was his title, the office that he held?

A. As I recall it, it was Secretary and General Manager.

Q. Did he have charge of the operation of the business of the Citizens Gas Company?

Mr. Thompson: To which question the Defendant City objects. The extent of Mr. Forrest's authority has to be established by the record, not by the oral statement of some witness.

Mr. Sparks: May the record show the same objection on the part of the Citizens Gas Company?

559 The Court: I think he can tell what he did, if that is what you want.

Mr. Burns: That is exactly what I want.

The Court: He could not express his opinion as to what his authority was.

Mr. Burns: No.

Will you read the question, please, Mr. Reporter?

(The Reporter read the preceding question as follows: "Did he have charge of the operation of the business of the Citizens Gas Company?")

A. He did.

The Court: I think the objection is sustained as to that.

Q. What did Mr. Forrest do in connection with the Citizens Gas Company?

A. He had no other connections that I know of. He devoted his entire time to the Citizens Gas Company and its business.

Q. And what did he do for the Citizens Gas Company? What functions did he perform? What work did he do?

A. Just everything.

Q. Did he take care of the sale and marketing of securities of the Citizens Gas Company?

A. He did, indeed.

Q. And did he have the contacts with the bankers and brokers through whom those securities were sold?

A. Entirely.

Q. And would he report to the Board the result of those negotiations?

A. Yes, sir.

Q. And did the Board object or raise any question about his dealing with the bankers and brokers?

Mr. Thompson: I don't like to object, your Honor, but it seems to me that the scope of Mr. Forrest's authority must be shown by the By-Laws and the appropriate resolutions or minutes of the Citizens Gas Company.

The Court: I will let him answer the question. Go ahead. Overruled.

Read the question, please.

561 (The Reporter read the preceding question as follows: "And did the Board object or raise any question about his dealing with the bankers and brokers?")

A. I think the Board was generally in full accord with his actions and approved them.

The Court: As I understand, he was an employe of the Citizens Gas Company. Is that right?

The Witness: How is that?

The Court: He was an employe, was he, of the Citizens Gas Company?

The Witness: Yes, and he was so proficient in his work that there was very little difficulty—very little objection found to his proceedings—to his actions.

Mr. Burns: That is all.

The Court: Any questions?

Mr. Thompson: No, your Honor.

Witness excused.

562 ALFRED F. GAUDING, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Gauding?

A. Alfred F. Gauding; 120 East Market Street; Vice President of The Union Trust Company.

Q. Do you have under your general supervision and control the files of The Union Trust Company of Indianapolis?

A. Yes, we do have.

Q. Did you state what office you hold at the Union Trust?

A. Vice President.

Q. Did you come here in pursuance of a subpoena to produce some documents?

A. Yes, I did.

Q. Have you produced from the files of The Union Trust Company the circular requested by the subpoena?

A. Yes, I have.

Q. May I see it? (The witness handed to counsel the 563 document subsequently marked Plaintiff's Exhibit No. 90).

Calling your attention to a document marked Plaintiffs' Exhibit 90, have you produced that from the files of the Bond Department of The Union Trust Company?

A. Yes, I have.

Q. And was that a circular that was used by The Union Trust Company in the sale of the Citizens Gas stock?

Mr. Thompson: May I see it, please? (Counsel for plaintiffs handed to counsel for defendants Plaintiffs' Exhibit No. 90.)

Do I understand that your Honor has indicated that we are to reserve all objections to all offers?

The Court: No, just the ones that were in this.

Mr. Thompson: I see. As I understand, the question at this point, now, is whether this was a circular that was used in the sale of Citizens Gas Company stock.

I want to object to the question—I think perhaps it may be in the way of a preliminary question—on the general ground that the Citizens Gas Company was the initial trustee of the public charitable trust; that no statement

564 made by the Citizens Gas Company of Indianapolis—this statement, by the way, purports to be made when? 1913?

The Witness: June 1st, 1919.

Mr Thompson: 1919. (continued)—could operate and create an estoppel against the City of Indianapolis or be evidence which would result in the enforcement against the City of Indianapolis of this Indianapolis Gas Company lease.

It seems to me, your Honor, that this is going vary far afield.

The Court: I will let him answer the question he is asked. That is a preliminary question, I think.

Mr. Thompson: It is, I think.

Mr. Burns: Will you read the question to the witness?

(The Reporter read the preceding question as follows: "And was that a circular that was used by The Union Trust Company in the sale of the Citizens Gas Stock?")

A. It was a circular in our files, but whether or 565 not it was used, I would not definitely say.

Q. You don't know that?

A. No, I don't know that.

Q. Have you been with The Union Trust Company since 1919?

A. Yes, I have, but not in the Bond Department.

Q. Not in the Bond Department. Were you also subpoenaed to bring the original letter from Mr. Forrest to The Union Trust Company, which is quoted on Pages 2 and 3 of the circular, Exhibit 90?

A. Yes.

Q. Did you make a search for that letter?

A. We did.

Q. Could you find it?

A. We were unable to find it.

Mr. Burns: You were unable to find it. I think that is all.

The Court: That is all.

Cross-Examination by Mr. Thompson.

Q. Of course, you were unable to find the original of what purports to be a letter from Mr. Forrest, in 566 your files?

A. That is right.

Q. And you have no knowledge of your own whatever that this letter, which is set out on Pages 2 and 3 of the Plaintiffs' Exhibit 90, is, in fact, a copy, or correct copy, of the actual letter that Mr. Forrest wrote?

A. I could not say definitely as to that.
Witness Excused.

GAVIN L. PAYNE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Payne?

A. Payne — P-a-y-n-e — Gavin L. Payne; investment banking business; Insurance Building, Indianapolis.

Q. Insurance Building, Indianapolis?

A. Indianapolis, yes, sir.

567 Q. How long have you been engaged in the investment banking business?

A. Well, I have been engaged under the name "Gavin L. Payne & Company" for thirty-two years, about—thirty-two or thirty-three years.

Q. And before that were you engaged in the investment banking business with someone else?

A. I was President of the Security Trust Company.

Q. Of Indianapolis?

A. Of Indianapolis.

Q. Mr. Payne, did you from time to time have something to do with the marketing of the securities of the Citizens Gas Company, both bonds and stock?

A. Yes, we were active in it.

Q. And during what period of time were you active in that?

A. Well, on the Citizens Gas Company, we were active in it from the beginning.

Q. Practically from the beginning down to the time when it was taken over by the City?

A. Up to the time it was taken over by the City.

Q. With whom did you deal in connection with
568 the security with the Citizens Gas Company?

A. With the Citizens Gas Company, chiefly—well, with the Citizens Gas Company on the issues put out by the Citizens Gas Company.

Q. Who represented the Citizens Gas Company in your dealings with it?

A. Well, Mr. Forrest, the General Manager and Secretary, and, then, we dealt also with the Board of Directors.

Q. In connection with your dealing in the issues of the Citizens Gas Company, did you receive from it the reports which it issued from time to time to its stockholders?

A. Yes, sir.

Q. Have you some of those reports with you?

A. I have.

Q. Calling your attention, Mr. Payne, to the four documents, which are marked Plaintiffs' Exhibits 91, 92, 93 and 94, are these original copies of the reports of the Citizens Gas Company to its stockholders, which were received by you from the Citizens Gas Company on or about their date?

A. Yes, sir, those were originals.

569 Mr. Burns: We offer those in evidence. (Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

Mr. Thompson: May I have them? (Counsel for Plaintiffs handed to counsel for Defendants Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

The City of Indianapolis and the individual defendants, who are members of its Board of Directors and its Board of Trustees for Utilities, object to the introduction in evidence of each of these Exhibits 91, 92, 93 and 94, for each of the following reasons.

I am going to state my objection, if I may, very carefully, your Honor, so that when similar papers arise, I may refer back to this objection.

First: The Citizens Gas Company was the initial trustee of a public charitable trust and had no power or authority to accept a lease on property which did not form a part of the trust res and bind the City of Indianapolis as successor trustee to the terms of said lease. Having no authority to bind the City by express contract, the Citizens Gas Company could not, by any act or admission of any of its officers or agents or by the issuance of any report, create any estoppel against
570 the City of Indianapolis in respect of such lease.

Second: A City cannot be estopped expressly and it follows that it cannot be estopped impliedly or in a quasi manner.

Third: As to the City of Indianapolis, this evidence is purely hearsay, as these reports were not prepared by any officer or agent of the City of Indianapolis, but it already clearly appears in this case that these reports were prepared by the Citizens Gas Company of

Indianapolis, which had no power or authority to speak for or bind the City.

Fourth: There is no showing that the person who made this statement had any power or authority to act for or on behalf of the City of Indianapolis, and I might add that there is no showing that these reports were used by the authority even of the Citizens Gas Company.

Fifth: In no event could any such admission have any probative effect unless there is a showing that some present holder of the bonds of The Indianapolis Gas Company relied upon such a statement.

571 Sixth: There is no showing that the lease of September 30, 1913, between Indianapolis Gas Company and the Citizens Gas Company, is binding or enforceable against the City, no showing that the City was a party to the lease, an assignee of the lease or obligated to accept an assignment thereof, or that the City ever recognized the binding effect of such lease upon it and, under such circumstances, a contract for a period of seventy-five years in the future against a municipal corporation cannot be created by estoppel.

Seventh: Under the Indiana statute, no lease of the character here involved can be valid unless approved by the Common Council and the Board of Public Works of the City, and no such lease is valid if for a term of more than twenty-five years. Any lease, made in violation of the provisions of the statute, is void and cannot be ratified. No such contract can be foisted on the City by estoppel.

(See Page 46.)

Mr. Burns: I would like to say just this.

The Court: That was all?

572 Mr. Thompson: That was all, your Honor.

The Court: May I see the exhibits, please? Counsel for defendants handed to the Court Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

Let me ask Mr. Payne: Did you purchase some of the bonds yourself, or stock?

The Witness: Beg pardon?

The Court: I say, did you purchase some of the stock yourself, or some bonds?

The Witness: I purchased a great deal of stock as it was offered by the company—

The Court: After you received—

The Witness: (continued.) —from the beginning; also as it was offered at auction.

The Court: After you received these statements that are offered in evidence?

The Witness: Well, yes. We handled it so generally during that period that I—

The Court: I am going to overrule the objection, and permit the exhibits to be admitted and read in evidence for whatever they may be worth.

This is purely on the theory that the City of Indianapolis, as successor trustee, would not be bound, of course, under the law, but, as the same time, I think I would be justified in permitting the admission of these documents in evidence for consideration in determining that question.

Mr. Thompson: I should like to add these two objections, your Honor: that so far as the stock or bonds of the Citizens Gas Company are concerned, even if the witness or other people relied upon these circulars in purchasing such stock and bonds, they have already been paid off and, therefore, evidence of that character, including these circulars, could have no probative weight.

My next statement is that, if these circulars have any effect at all, it is because a claim will be asserted by the plaintiff that they are an admission of a legal proposition; that is, of validity and enforceability of this ninety-nine year lease against the City of Indianapolis, and the admission of a legal proposition can never create an estoppel.

The Court: Let the record show that these additional specifications of the objection are made before the ruling of the Court.

574 The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 91, 92, 93 AND 94, were admitted and read in evidence.

Mr. Burns: I would like to make this comment, if I may, because I think it is applicable to a great deal of the evidence that is here and is particularly applicable to the objections which Mr. Thompson has made.

The City of Indianapolis accepted the conveyance of this property, subject to all of the obligations of the Citizens Gas Company, so that the question is, or at least, one of the very important questions is, what were the obligations of the Citizens Gas Company? Now, in determining what the obligations of the Citizens Gas Company are which the City has assumed or, in effect

has assumed, at least, in that the property is in the hands of the City, it is competent to consider every admission that the Citizens Gas made that bears on the problem.

The Court: Well, I have admitted them in evidence.

575 Mr. Burns: Yes. I thought it perhaps would be helpful if I just stated our position on that matter.

The Court: Any other questions?

Q. Mr. Payne, subsequent to the receipt of these reports in 1913 and 1914, did you buy from the Citizens Gas Company stock and bonds, at various times, of the Citizens Gas Company?

A. I bought stock and bonds and also—my recollection is that we bought Indianapolis Gas bonds. I think it is stated in one of those circulars that the company had sold quite a block of bonds.

Mr. Thompson: Your Honor, without repeating my objection, may it be understood that the City is objecting not only to these questions and these exhibits, but to all testimony along this line, without the necessity of repeating?

The Court: Yes, you may have your objection.

They have been read in evidence.

Q. Mr. Payne, was there, during the period from 1915 to 1935, in one or in one or two well accepted manuals, a source of information upon which bankers and
576 brokers and business men and the investing public relied in making investments?

A. Well, the Poor's Manual, I think, was the one—Moody's came a little later, but Poor's originally.

Q. After a while the two ran along concurrently and then Poor's and Moody's were consolidated? Is that the fact?

A. Well, I don't recall as to the—Poor's was the first manual and, then, Mr. Moody started in the business, a few years after Poor, in competition and a good many people took both manuals and accepted either one of them.

Q. Now, calling your attention to a book, which I will mark Exhibit 95 for identification, I will ask you if that is Poor's Manual of Public Utilities for 1915,—

A. Yes, sir.

Q. (continued.) —which you have had in your office since about that time?

A. Yes, sir, 1915.

Q. And calling your attention to a book, marked Plaintiffs' Exhibit 96 for identification, is that Poor's Manual for Public Utilities for the year 1922?

A. Yes.

577 Q. And calling your attention to a book marked Plaintiffs' Exhibit 97, is that Poor's Public Utility Manual for the year 1935?

A. Yes, sir.

Q. Which you have had in your office?

A. Yes, sir.

Q. Calling your attention to a book marked Plaintiffs' Exhibit 98 for identification, is that a copy of Moody's Manual for 1923?

A. Yes, sir.

Q. Which you have had since about that time?

A. Well, I don't recall that that was ours.

Q. You can identify it as Moody's Manual?

A. As Moody's Manual, yes.

Q. Are those manuals, Moody's Manual and Poor's Manual, generally relied upon by the investing public in the making of investments and buying of securities?

A. They are relied on by the dealers and investment bankers and also, to a more limited extent, probably, by the purchaser of securities.

Q. From your experience in the field of investment banking and particularly in the field of public utility
578 securities, do you know how those manuals are made up?

Mr. Thompson: If this question, your Honor, calls for —if that is an attempt to prove, now, in a back-handed sort of way, that, because there is certain information set forth in Moody's Manual, the Citizens Gas Company was responsible for it, I object to it because that has got to be approved affirmatively.

The Court: The objection is sustained as to how it was made up.

Mr. Burns: Note an exception.

The Court: I wonder if we could adjourn at this time. Were you about through with this witness?

Mr. Burns: I was about through, your Honor.

The Court: Let's finish with the witness, then.

Offer to Prove.

Mr. Burns: We offer to prove by the witness that the practice in making up these manuals is for the publishers of the manuals to send questionnaires to the various

companies to receive that information from the companies and that the information, contained in the 579 manuals, is made up from the information received from the various companies upon which the reports are made.

The Court: Any other questions?

Mr. Burns: You may inquire.

Mr. Thompson: I have no cross-examination.

The Court: That is all.

Witness Excused.

Mr. Thompson: Now, your Honor, before adjournment, I want to move to strike out the testimony of Mr. Payne for the reasons assigned in the objections to the exhibits and the additional reason that no showing has been made and no offer has been made that any present owner of the bonds of The Indianapolis Gas Company purchased them from Mr. Payne or relied upon any circulars or any of the other information to which he has testified, and that that is a condition precedent to this testimony being admissible.

The Court: The motion is overruled. Let us adjourn, Mr. Marshal, until two o'clock.

Whereupon, the trial was adjourned until two o'clock this afternoon.

580

Indianapolis, Indiana,
Thursday, March 2, 1939,
Two o'clock P. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

Mr. Thompson: If your Honor please: Mr. Burns, you have offered Paragraph 4 of the Stipulation of Facts in the Todd case, appearing on Pages 192 and 193 of Exhibit 2. I want to know whether all of the parties will agree that that is taken from the Stipulation of Facts, the opening sentence of which reads as follows: "The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answer, are true."

Mr. Burns: I will admit it.

Mr. Thompson: Will other counsel make the same admission?

Mr. Ewbank: Yes.

(No dissenting expression.)

Mr. Thompson: You have also offered in evidence as

Exhibit 89 the second and third and fourth grammatical paragraphs from Section 18 of the Answer of the City of Indianapolis and others in the case of Cotter and others versus The Citizens Gas Company, being Cause 1192 in the Equity Docket of this Court. Will you admit that the Answer, from which the expressions referred to are taken, is signed in the following manner, and not otherwise: John W. Holtzman; Oren S. Hack; Edward H. Knight; Smiley N. Chambers; Pickens, Gause, Gilliom & Pickens, Attorneys for said Answering Defendants. John W. Holtzman, Fred C. Gause, of Counsel. And that the Answer is not verified by anyone.

Mr. Burns: We will admit that.

Mr. Thompson: And will the other counsel admit it?

Mr. Ewbank: On your statement that it is so, yes.

(No dissenting expression.)

Mr. Thompson: May the record show those admissions, your Honor?

The Court: Yes.

582 PAUL E. CROSIER, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

. Direct Examination by Mr. Burns.

Q. Mr. Crosier, will you state your name, your age and your occupation?

A. Paul E. Crosier; fifty-three years old; I am in the recreational business.

Q. Where do you live?

A. 421 Poplar Road, of this city.

Q. Were you at one time connected with the Citizens Gas Company of Indianapolis?

A. I was.

Q. During what period of time?

A. For eighteen years.

Q. Beginning when?

A. 1918.

Q. Until—

A. January 6, 1936.

Q. Well, during the last three or four months of
583 your connection, you were with the Citizens Gas & Coke Utility?

A. Yes, that is right.

Q. Now, what offices or positions did you hold with the Citizens Gas Company?

A. Assistant Superintendent of the Prospect Plant, Assistant General Manager.

Q. Were you for a while General Manager?

A. Acting General Manager.

Q. That was after Mr.—

A. Mr. Kirk—

Q. (Continued.) —after Mr. Kirk died?

A. That is right.

Q. And you were Acting General Manager at the time the City took over the Citizens Gas property?

A. Yes, that time I was changed to Acting Assistant General Manager.

Q. And you were Acting Assistant General Manager from September 9th, 1935 to January 6th, 1936?

A. That is correct.

Q. Now, in the various capacities in which you served the Citizens Gas Company, did you become familiar
584 with the plant and facilities of the Citizens Gas Company and The Indianapolis Gas Company?

A. Yes.

Q. The plant of The Indianapolis Gas Company was made up of three units, was it not—the distribution system, the Langsdale Plant and the Pratt Avenue part of the property were the distribution system?

A. The Langsdale Plant, of the Plant Department, handled about sixty-five per cent of the mains of Indianapolis, that is right.

Q. Was that percentage, that sixty-five per cent—

A. Approximately.

Q. (Continued.) —constant during the time you were with the company?

A. Yes, sir, it was held constant.

Q. Now, were those two plants of The Indianapolis Gas Company and the Citizens Gas Company operated as a single unit, together?

A. Yes, that is correct.

Q. The gas from the Langsdale Plant might be used in supplying the Citizens Gas customers?

A. It was.

585 Q. And the gas from the Prospect Plant—

A. Yes, the mains were interconnected.

Q. And the mains of the Indianapolis Gas would be necessary to be used in order to go to some of the Citizens Gas distribution system?

A. That is right.

Q. And the mains of the Citizens Gas Company would be necessary to be used in order to get to some of the Indianapolis Gas distribution facilities, is that correct?

A. Yes, that is correct.

Q. The operation of those two properties together had certain financial advantages, because it saved a duplication of facilities, I suppose.

Mr. Thompson: Defendant objects to that, your Honor.

The Court: I did not know that there was any question but that they did use the property of The Indianapolis Gas Company. I don't know the purpose of this. Isn't that true?

Mr. Thompson: Yes, sir.

The Court: The Citizens Gas Company used Indianapolis Gas Company equipment and mains, and if we are not going into the question of the value of maintenance in this case—

Mr. Burns: The City, as a matter of fact, took possession of the plant of The Indianapolis Gas Company after September 9th, 1935, and we could not get a stipulation out of them on that subject. That is the reason I am going into it.

Mr. Thompson: I am sorry. I don't like to interrupt. We never made denial of that.

The Court: Do you admit it now?

Mr. Thompson: Yes, sir, we do. Of course, the whole point is, we did it pursuant to certain agreements.

The Court: That seems to be the bone of contention.

Q. After the City took over the property, on September 9, 1935, did the City continue to operate the two plants, of the Indianapolis Gas and the Citizens Gas, as a unit?

A. As far as I know, up to January 6th, when I was retired, that is right.

587 Q. And during that part of the time and for some time before January 9, 1935—I should say some time before September 9, 1935, the Citizens Gas Company and the City did not use the coke ovens of the Langsdale Plant of the Indianapolis Gas?

A. As I remember, they were shut down in 1931, on account of economical conditions.

Q. And were not opened up after that?

A. That is right.

Cross-Examination by Mr. Thompson.

Q. Are you familiar with the records that were kept by the Citizens Gas Company, and the records that were kept by the Department of Utilities, in respect to the property of The Indianapolis Gas Company?

A. No, I am not.

Q. Don't know anything about them?

A. Didn't come under my jurisdiction at all.

Q. Were you familiar with the agreements that were made between the City of Indianapolis and The Indianapolis Gas Company?

588 A. No, sir.

Q. In respect to the use of the property?

A. No, sir.

Redirect Examination by Mr. Burns.

Q. After the City took over the property in September, 1935, it did operate the water gas plant out there at the Langsdale Plant, didn't it?

A. As far as I know, up to January 6, 1936.

Q. You did know about that?

A. Yes, sir.

Q. And it did operate it, then?

A. Yes, sir.

Witness excused.

CHESTER A. JEWETT, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Jewett, will you state your name, your age
589 and your address and present occupation?

A. Chester A. Jewett; fifty-three; Broadview Farm, Shelbyville, Indiana.

Q. Were you for some time connected with the Union Trust Company of Indianapolis?

A. I was.

Q. During what period of time?

A. From October 2nd, 1916 to March 1st, 1920, I was Manager of the Bond Department.

Q. And had you had experience in the security business and the sales and purchases of securities prior to that time?

A. Yes, sir, from 1912.

Q. And here in Indianapolis?

A. Yes, sir.

Q. With what company were you connected during that time?

A. I was with Miller & Company for about two and one-half years of that time; and Manager of the Bond Department of the American Mortgage Guarantee Company prior to my going with the Union Trust Company.

Q. And did you say you left the Union Trust Company in 1920?

590 A. Yes, sir, March 1st.

Q. Where did you go after that?

A. I went in partnership with Otto F. Haueisen, under the firm name of Haueisen & Jewett.

Q. How long were you associated with him?

A. We were associated together one year, at which time I bought his interest and then operated as Jewett & Company.

Q. Until what time?

A. Until 1933.

Q. And during all that period, from 1912 to 1933, you were engaged in the business of investment banking here in the city of Indianapolis?

A. Yes.

Q. During the period that you were with the Union Trust Company and during the period after that did you have anything to do with the marketing of either the stock or the bonds of the Citizens Gas Company, or bonds of The Indianapolis Gas Company?

A. Yes.

Q. Which ones of these did you have to do with in the way of marketing?

591 A. Well, we marketed, as members of a syndicate, with Gavin L. Payne as syndicate manager, I would say in probably 1916, late in the year 1916, a quarter of a million dollars of the voting trust certificates. We sold by syndicate, in which every member of the Indianapolis Stock Exchange participated.

Q. That was the voting trust certificates of the Citizens Gas Company?

A. Yes, sir, and we were—the Union Trust Company Bond Department participated in that offering, and then

in 1918—in 1919, the Union Trust Company underwrote the major portion—all but a few scattered shares—of five hundred thousand dollars worth of Citizens Gas certificates, completing the capitalization of two million, which was under my supervision at the Union Trust.

Q. Calling your attention to an exhibit which previously had been identified as Plaintiffs' Exhibit 90, I will ask you whether that is the circular which was used in connection with the marketing of the common stock of the Citizens Gas Company in 1919.

A. It is, yes.

592 Q. What did you have to do with the preparation of that circular?

A. I prepared the circular.

Q. I call your attention to the letter appearing upon pages 2 and 3 of that circular. Did you, at the time that circular was prepared, have the original letter from Mr. Forrest in your possession?

A. Yes, sir.

Q. And is the letter as set forth in that circular, on pages 2 and 3, from Mr. Forrest to the Union Trust Company, a correct copy of the original letter?

A. Well, I would have to have the original letter and check it word for word; but I would say it is substantially the same, because I remember very vividly using that letter as the basis of our circular, and it was copied as nearly as we could check it at the time, letter for letter, as to the ones received from Mr. Forrest. Of course, it is always customary and has been in investment banking to receive such letters, which are the basis of representations, under which we purchase the stock and under which we

sell. As nearly as I could say, it is my memory through
593 the years, I would say this was a true and exact copy of the letter of Mr. J. D. Forrest, prepared in connection with our purchase of the stock.

Q. Your regular practice was to compare the circular with the letter as received?

A. Oh, yes. Yes, indeed.

Q. Who was Mr. J. D. Forrest?

A. Mr. J. D. Forrest was Secretary and General Manager of the Citizens Gas Company.

Q. And did you deal with him in connection with the purchase of securities from the Citizens Gas Company?

A. Yes.

Q. Did you deal with anybody else at the Citizens Gas Company in connection with the purchase of securities?

A. Well, of course, this direct purchase of the issue, of which this circular is an offering, was purchased by the Union Trust Company at public auction, at the office of the Citizens Gas Company, and that sale, of course, was being conducted under the direct supervision of Mr. Forrest. I suppose some of his assistants were there.

594 Q. In dealing with the other security issues of the Citizens Gas Company, with whom did you deal?

A. Well, anyone dealing with the Citizens Gas Company, particularly on the financial end of it, always dealt with Mr. Forrest. The other officers, that is, the President and Vice President and even the Treasurer, I think were not active.

Q. Mr. Forrest actually operated the company?

A. Yes, Mr. Forrest conducted all the relations with the Union Trust Company, both as to the deposit of money or the borrowing of money, or any other relations that we had with him.

Q. Now, I call your attention to Exhibit 12 attached to the depositions of Chester M. Clark and Joseph Edward Baker, taken in New York. I will ask you if you had anything to do with the purchase or sale of the securities covered by the circular there shown as Exhibit 12.

A. Yes, we participated in the distribution—the local distribution of a million five hundred thousand Citizens Gas Company general mortgage sinking fund 7s, issued May 1st, 1918.

595 Q. Which are shown by circular, Exhibit 12?

A. Yes, sir.

Q. From whom did you buy those bonds?

A. Those bonds were underwritten by a syndicate headed by Blodgett & Company, Boston.

Q. And did you buy those bonds from that syndicate?

A. We were offered participation by Blodgett & Company, after the purchase of the securities, and I imagine our department distributed around six hundred thousand of the million five hundred thousand issued.

Q. In the purchase of those bonds, did you rely upon the circular, Exhibit 12, that has just been shown you?

Mr. Thompson: A preliminary question.

Mr. Jewett, all of these bonds that you talk about—the Citizens Gas seven per cent bonds—were retired by the Citizens Gas Company long ago?

The Witness: Oh, they were retired long before the City was interested. They had a definite maturity, Mr. Thompson. I think they were retired—well, they were re-

tired beginning May 1st, 1920, '21, '22 and '23, and there never was any default on them, and they were all 596 retired or called by 1923—this particular issue, yes.

Mr. Thompson: If the Court please, the defendant, City of Indianapolis, objects to this evidence in connection with this bond issue which was retired long prior to the transfer to the City. Any representation made in connection with it by the Citizens Gas Company could not have any possible binding effect upon the City of Indianapolis, and could not have been relied upon by the present bondholders of the Indianapolis Gas Company.

Mr. Burns: As I said this morning, the City of Indianapolis accepted the property conveyed to it subject to all obligations of the Citizens Gas Company. In considering what the obligations of Citizens Gas Company are, it is material to consider in evidence which were contemplated against the Citizens Gas Company, to establish those obligations. This is clearly an admission in this circular of the existence of the ninety-nine year lease, and the constant publication of that fact is clearly admissible against the City of Indianapolis.

597 The Court: I have admitted those documents—I admitted them this morning for the purpose of throwing any light, if there is any light at all, upon the activity of the former trustee. Now, it is a question of law whether the trustee had any such right. I think I am going to admit this on that theory, that it will get the facts before us; what was done. That is not an obligation that was assumed by the City in any sense at all, but it only goes to show the manner in which the former trustee transacted the business. Whether that sheds any light upon the question of whether that trustee had any right to do that is to be determined. I am frank to say that, in my opinion, any admission made by the former trustee would not bind the City of Indianapolis, as trustee, if there was no legal right to make such warranty or such representations.

Mr. Thompson: I want to make an additional objection here. First, the admission sought to be proved would be an admission to the legal effect of the lease. Now, this is a very important factor; there was no right in the 598 Citizens Gas Company to execute any mortgage whatever. Any mortgage that was executed was an absolute violation of the underwriting trust instrument, and, therefore, any admission made by the Citizens Gas Company in connection with the execution of a mortgage certainly could not bind us.

The Court: I understand your contention on that. Go ahead.

Mr. Burns: Plaintiff offers in evidence Exhibit 90 and Exhibit 12 attached to the deposition before referred to.

Mr. Thompson: The City objects to Exhibit 90 for the same reasons given on objections to Exhibits 91, 92, 93 and 94; and we object to the exhibit attached to the deposition unless the deposition itself is offered.

Mr. Burns: It will be, in time.

The Court: I will withhold the ruling on the deposition exhibit (Exhibit 12), and overrule the objection on the other (Exhibit 90).

The said document, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 90, was admitted and read in evidence.

599 The Court: You were in the employ of the Union Trust Company during the years '16 to '20?

The Witness: Yes, sir.

The Court: Any other employment?

The Witness: No other employment except in connection with war financing, of course, where I was loaned to the Government.

Mr. Burns: What office did you hold with the Union Trust Company?

The Witness: Manager of the Bond Department.

The Court: You were not connected with the State Auditor's office?

The Witness: Oh, no, I never was connected with the State Auditor's office. That was my brother Russell.

Q. Did you go to Boston in connection with the purchase of these Citizens Gas Bonds from Blodgett & Company?

A. Yes, sir.

Q. While you were there whom did you consult about those bonds?

A. Mr. Blodgett, senior partner of Blodgett & Company.

Q. And did you have occasion, while you were there with Mr. Blodgett, to consult any standard works of 600 reference in regard to securities and security issues, particularly with respect to the financial statements of the Citizens Gas Company?

A. We did, yes.

Q. And do you recall what work you consulted?

Mr. Thompson: I hate, your Honor, to be in the posi-

tion of constantly objecting. Whether this witness consulted some standard statistical work is far afield.

The Court: Objection sustained.

Mr. Burns: An exception.

Offer to Prove.

Mr. Burns: We offer to prove that the witness and Mr. Blodgett consulted Moody's Manual for Investors in connection with this Citizens Gas issue, and relied upon it in determining what they would do in connection with the purchase of the issue.

The Witness: Well, I should like to correct that just a little bit. This issue which we were immediately distributing, there was no reference made to it in Moody's Manual at that time.

601 Q. But you had Moody's Manual for reference for information about the status of the Citizens Gas Company?

A. On just the financial standing. Of course, now, the special reason that came up was because, after this general mortgage financing, it made the financial structure of the Citizens Gas too top-heavy and there was some objection, and it was at that time—that suggestion was made by the eastern bankers that something be done locally to complete the capitalization of the company to two million dollars from a million five hundred thousand, so that the senior securities would be a little bit—be balanced with the junior securities. Of course, that was done just as reasonably as it could be done, which finally culminated in our underwriting the five hundred thousand dollars worth of the common stock the next year, and that is the reason we consulted Moody's Manual, I suppose, as Poor's would offer the information, but it was more available there, to see the relative position and balance between senior and junior securities.

Q. And is Moody's Manual customarily relied
602 upon by brokers and bankers and the investing public generally in the purchase of securities and in securing information about securities?

A. Yes, I would say so.

Q. Is it considered a standard work of reference on that subject?

A. Yes.

Q. Is that true of Poor's Manual?

A. Yes. We used to take both, but those are not

the only works on statistics that are relied on. There is Fitch's Bond Manual and the Standard Statistics.

Q. But during the years from 1915 to 1935, would it be accurate to say that Moody's Manual and Poor's Manual were the outstanding works of reference on that subject?

A. Well, I would say they were two of four. I don't think any better than Fitch's; in some respects I don't like it as well as Standard Statistics; but they are all reliable.

Mr. Burns: Rather than offer these volumes, I have had prepared photostatic copies of the pages of the 603 volumes, not only of these volumes, but other volumes of Moody's Manual, and we could present those volumes here if the Court wishes us to do so.

Covering the years 1915 and 1922 and 1935, I offer Poor's Manual; and covering the years 1923 to 1935, inclusive, I offer Moody's Manual; and I should like to have these marked as exhibits, and offer them in evidence.

Mr. Thompson: What are the exhibit numbers, please;

Mr. Burns: I will have them marked.

The Court: That was all with this witness?

Mr. Burns: I should like to keep him until I get this identified, and ask him a question or two, if that is all right.

The Court: I understand you identified the books.

Mr. Burns: I have identified the books. I think I shall give these exhibits a corresponding number.

The Court: As I say, we will not need the witness if it is in the book. The book shows what is true about it.

Mr. Burns: As I say, I have not brought all the books here, and unless there is some objection, upon 604 that ground, I won't bring all of them here.

I ask to have an excerpt from Poor's Manual of 1915 marked Plaintiffs' Exhibit 95-a, which corresponds with the number of the book previously marked. (Excerpt so marked by the Reporter.)

I ask to have an excerpt from Poor's Manual of 1922 marked Plaintiff's Exhibit 96-a, which corresponds with the number given to the volume itself. (Excerpt so marked by the Reporter.)

An excerpt from Poor's Manual of 1935 will be marked Plaintiffs' Exhibit 97-a; and an excerpt from Moody's Manual of 1923, as Plaintiffs' Exhibit 98-a. (Excerpts so marked by the Reporter.)

I also offer and ask to have marked as Plaintiffs' Exhibits 99 to 110, inclusive, excerpts from Moody's Manual with respect to the Citizens Gas Company of Indianapolis, covering the years 1924 to 1935, both inclusive.

Mr. Thompson: The City objects to the introduction in evidence of Exhibit 90 and Exhibits 95-a to 98-a, inclusive, and Exhibits 99 to 110, inclusive, for the reasons stated in the City's objections to Exhibits 605 91 to 94, inclusive, and, in respect of Exhibits 95 to 110, both inclusive, for the additional reason that no proof whatever that the statements, appearing in Poor's or Moody's Manuals, were even authorized by the Citizens Gas Company.

The Court: I assume that was the purpose of this subpoena duces tecum: to bring in the correspondence to see whether or not it was authorized.

In view of the fact that these are standard works, I think they are competent. That is the usual rule, is it not, relative to statistics that are of national standing?

Mr. Thompson: Well, of course, your Honor, I assume that these exhibits which are offered have no other purpose than that of creating some estoppel against the City of Indianapolis in connection with this lease.

Now, my first position—I do not need to elaborate it—is that the acts of the Citizens Gas Company would not be binding on the City, but, here, you have not only the question of what the statistics are, but whether 606 this lease is an enforceable obligation. When counsel offers statistical reports on the issue of the obligation of this lease on the City of Indianapolis, without any proof whatever that any statement in that connection was ever authorized by the initial trustee, it seems to me to be going far afield.

The Court: Are you going to be able to introduce any evidence on that question?

Mr. Burns: Well, of course, that was one of the purposes of our issuing the subpoena.

The Court: Well, I think you waited a long time to issue a subpoena calling for such information, just two days before the trial, where it was known, or should have been known, months ago, because the case has been assigned three times for trial, that that information was necessary. I cannot sustain your position with reference to the subpoena at all, on that question, because, if the

rules mean anything on reasonableness, I would think that would certainly come within the rules.

I will withhold my ruling on these exhibits that have just been offered.

607 My present thought is that, on the showing of the kind of works that these are, they would be admissible, but I am not going to pass on it at this time.

If these were Government publications,—I have in mind some cases we have had here, that Mr. Thompson has been in,—I think there would be no doubt that they would be competent.

Wouldn't you think that the same rule would apply to a private publication of this kind, or not? I think we have had several cases where the Agricultural Department reports have been read in evidence.

Mr. Burns: I call the Court's attention to the fact that when a substantially identical report so far as the matters here in issue was made over a period of twenty years, it is practically inconceivable that they did not come to the attention of the officers and directors of the Citizens Gas Company.

The Court: Well, that, of course, within itself would not be sufficient. It would not show whether they had objected to the publisher or not, or whether they paid any attention to it or not.

608 I am taking the view that these are standard publications and are reputable and entitled to some consideration.

Did you want to ask this witness any further questions?

Mr. Burns: I take it that there is no objection made to these on the ground that we have not produced the original subject matter?

Mr. Thompson: Why, no, Mr. Burns, I make no objection of that kind.

The Court: Do you want to ask this witness any more questions?

Mr. Burns: I think not.

The Court: Any questions, Mr. Thompson?

Mr. Thompson: Yes, I have just a question or two, your Honor.

Cross-Examination by Mr. Thompson.

Q. Mr. Jewett, you have already stated that the mortgage bonds which were sold to the Trust Department of

the Union Trust Company were redeemed and retired by the Citizens Gas Company long prior to the transfer of its property to the City?

A. You mean sold through the Trust Department or Bond Department?

Q. Through the Bond Department, if I said "Trust Department"?

A. Yes.

Q. Now, also, you know that the stock, which you have talked about, the Citizens Gas Company common stock, was paid and retired at the time of the transfer of the property of the Citizens Gas Company to the City of Indianapolis?

A. I understood that was part of the consummation of the deal, yes.

Q. Now, in this circular, which is identified as Exhibit No. 90, which includes the letter of Mr. Forrest, appears this statement: "On October 1st, 1913, with the approval of the Public Service Commission of Indiana, this company took over, under a ninety-nine year lease, all of the operating property of the Indianapolis Gas Company," and so and so and so.

Before this circular, which is identified as Exhibit 610 90, was issued, did you examine the lease between the Citizens Gas Company and The Indianapolis Gas Company?

A. Do you mean did I, personally?

Q. Yes.

A. No, not I, personally.

Q. Or ever have an examination made?

A. No, not I, personally. The Union Trust Company was in continual knowledge of the affairs of the Citizens Gas Company and The Indianapolis Gas Company throughout the years.

Q. Did you ever learn, before the circulars were issued, that the lease of September 30, 1913, between the Citizens Gas Company and The Indianapolis Gas Company, contained a provision that if, because of the length of the term of the lease, it should be finally held invalid by a court of competent jurisdiction, that the lease should, nevertheless, be valid for the longest term for which the parties could lawfully contract?

A. I have heard that question raised, yes.

Q. So that when this circular was issued and when this statement was made over the signature of The Union

Trust Company that there was a ninety-nine year
611 lease, you knew of the provision to which I have just referred?

A. Well, I couldn't—I just have a hazy knowledge of it. I never saw the lease—the instrument of the lease—at all.

Q. But you had heard of that provision?

A. No more than I had seen any of the actual—the charter or the franchise under which the Citizens Gas trust had been created. I suppose Mr. Hornbrook, our attorney, did.

Q. Of course, you knew the question of whether this lease was valid for ninety-nine years, or not, was not a question of fact but a question of law?

A. Probably, yes. As a matter of fact, I didn't—I was not in position to take all of the responsibility that attached to the purchase by The Union Trust Company of these large—

Q. I didn't mean to question that, Mr. Jewett.

A. I see.

Q. Now, just one other question. These manuals to which you have referred, the Poor's and Moody's Manuals, are not official or governmental publications in
612 any way?

A. Oh, no.

Q. They are published by private corporations which are engaged in the publication for profit?

A. Well, that is true. That is like any organization, or we have many of them that furnish information such as Dun & Bradstreet, for instances, which is a private corporation, and yet business men rely on it.

Q. Oh, yes, I understand.

A. Rely on the information.

Q. The only point I am asking about, Mr. Jewett, is whether these are private or governmental publications.

A. They are private.

Q. Private?

A. They are private. I imagine the Government uses them, though, in evaluation. I know bank examiners use them in the evaluation of securities that are held by banks. I know Moody's ratings are regarded by bank examiners as reflecting whether or not a bank can properly and prudently purchase certain securities.

Mr. Thompson: The only point I am asking about is whether they are private or public.

613 The Court: All right, Mr. Jewett.
Mr. Thompson: That is all.
Witness excused.

WILLIAM J. YULE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Yule?

A. William J. Yule. So you want my business address?

Q. Yes.

A. 1004 Majestic Building; and age?

Q. Occupation?

A. Occupation, Secretary of The Indianapolis Gas Company.

Q. How long have you been connected with The Indianapolis Gas Company?

A. Well, continuously since 1915.

Q. And during all of that time have you been Secretary of the company?

614 A. Yes, sir.

Q. As Secretary, do you have charge of the records and files of the company?

A. I do.

Q. And you keep the minute books of the company?

A. I do.

Q. And have during all of that time?

A. I do.

Q. Now, during the year 1936, at the time when the last coupon was paid upon the bonds of The Indianapolis Gas Company, did you make up as nearly a complete list as you could of the bondholders who had sent in their coupons?

A. As the Government revenue reports came in with the coupons, I listed those. We could gather the information from them.

Q. And were you able to make a complete list?

A. Oh, no.

Q. It appears, here, in the stipulation that coupons for the April 1st, 1936 date, in the amount of seven hundred and seventy-five dollars, have not been paid. Do

you know who the bondholders are or the names or
615 addresses of the bondholders who have not—

A. I wouldn't have any idea at all.

The Court: These are bearer bonds, are they?

The Witness: Bearer bonds, yes, sir.

Q. Under their terms, they may be registered as to principal, I think, with the Trustee?

A. Yes, sir.

Q. And you don't know how many of them may be registered with the Trustee as to principal?

A. I don't have any knowledge of any being registered.

Q. I see. Did you bring with you the file of correspondence between yourself and the Chase National Bank?

A. Yes, sir.

Q. Calling your attention, Mr. Yule,—

The Court: Are these the interrogatories that were ordered to be answered?

Mr. Burns: Yes, these are the interrogatories that were answered by The Indianapolis Gas Company.

The Court: That is, the interrogatories propounded by the defendants?

616 Mr. Burns: The City.

The Court: Well, do you want to introduce the interrogatories and answers?

Mr. Burns: I want to introduce just some of the letters that are attached. I thought it would save time to introduce these rather than to have him dig them out of his files.

Q. Calling your attention to two exhibits, both of them marked Exhibit 11, to the answers of The Indianapolis Gas Company to the interrogatories propounded by the City: Did you receive the letter dated July 19 from the Chase National Bank,—

A. I did.

Q. (Continued)—on or about its date, and was there enclosed therewith a letter from Scudder, Stevens & Clark, dated July 17, also shown as Exhibit 11 attached to your answers?

A. Yes, sir.

Mr. Ewbank: What year?

Mr. Burns: 1935.

The Witness: 1935.

617 Q. And showing you a paper marked Plaintiffs' Exhibit 111-C, I will ask you if that is a copy of

the letter that you wrote to Scudder, Stevens & Clark and the copy which you sent to the Chase National Bank?

A. It is.

Mr. Burns: We offer the three letters just referred to as Plaintiffs' Exhibits 111-A, 111-B and 111-C.

Mr. Thompson: The City objects to these exhibits. They are entirely hearsay and exparte as to the City of Indianapolis.

The important part of this, your Honor, is a letter signed by The Indianapolis Gas Company, in which it takes the position that the City of Indianapolis, while it has not a legal title, has an equitable title to the property of the Citizens Gas Company and so forth and so on.

Now, certainly, the Indianapolis Gas Company cannot create an obligation against the City of Indianapolis by writing some letter to—

The Court: Is this on the issue of collusion?

Mr. Burns: No, it is stated in the answer of the

City that the trustee and the bondholders were guilty of laches in not taking some action, before September

9th, to except to this transfer of the property. The fact is that the Trustee did not even know that the city was taking any such attitude as it took in repudiating its obligation until sometime after September 9th. This is offered to show that the Trustee wrote and inquired of the Indianapolis Gas as to what the fact was, and was assured by Indianapolis Gas that the City was going to take over the property.

The Court: Let me see the letter. You can go ahead with any other question you have.

Mr. Burns: In connection with my next question was going to use those same interrogatories.

The Court: Well, I can't pass on that because I don't know what is in the letters. Go ahead with your question. I can pass on those later.

Who are Scudder, Stevens & Clark?

Mr. Burns: Well, I understand that they are a firm of investment advisers, so-called, and that they were inquiring about these Indianapolis Gas bonds of the

Trustee and whether the City was going to take over the lease, and that inquiry was forwarded by the

Trustee to the Indianapolis Gas, in Indianapolis, and Indianapolis Gas wrote back, "Until the City has a legal title, it could not legally assume the lease, and we are advised that this should follow as a matter of course, when the other property is transferred."

Now, this was August 17, 1935.

The Court: I am certain that the letters would not be competent as to the truthfulness or be binding upon the City of Indianapolis as to any statements made in them, unless—

Mr. Burns: I don't contend that they are.

The Court: (Continued.) —excepting they would only be competent, if competent at all, to show that there was some inquiry being made and some action taken.

Mr. Burns: That is the only purpose for which they are offered.

The Court: To answer the position of the City on the question of laches?

Mr. Burns: Yes, that is the only purpose for 620 which they are offered.

The Court: But, of course, they couldn't bind the City upon the statements contained in them.

Mr. Burns: There is no question in my mind that they are not competent for that purpose.

The Court: I do not know what the substance of the letters is, but I can see no reason why the letters should not be competent just the same as on the question of collusion. They would only meet that issue by showing what the parties, charged with collusion, did between and among themselves. Now, why wouldn't that same thing be true with reference to the charge of laches, to show what the parties did?

Mr. Burns: That is what I was trying to do.

The Court: Wouldn't that be true, Mr. Thompson? Wouldn't they be permitted to show what they did, to meet that issue? The statements in the letters, of course, would not be binding.

Mr. Thompson: No, but here is this situation: this does not affect the relation between The Indianapolis Gas

Company and the Chase National Bank, as Trustee.

621 I am not sure whether a copy of this letter went to Chase, but assuming that it did, this was a letter which Chase had asked the Indianapolis Gas Company to write to someone else.

The Court: Well, as I say, I have not seen the letters and I don't know what they are about, excepting as the statements were made. You may proceed in your regular way.

Q. A copy of this letter to Scudder, Stevens & Clark, Plaintiffs' Exhibit 111-C, was sent to The Chase National Bank, was it not?

A. It was.

The Court: You may go right ahead with your inquiry, Mr. Burns.

Q. Calling your attention to two other letters, attached to your answers to the interrogatories, Mr. Yule, as Exhibit 12, a letter of September 6th from Paul C. Beardslee and the enclosure from Russell Berg & Company to The Chase National Bank, were those received on or about their date?

A. They were.

622 Q. And did you answer the letter of Russell Berg & Company?

A. I did not.

Q. And made no reply to the Chase Bank?

A. No reply at all.

Mr. Burns: We offer those two letters in evidence as Plaintiffs' Exhibits 112 and 112-A.

Mr. Thompson: The same objection, your Honor.

The Court: I want an opportunity, as I say, to examine those.

Mr. Thompson: Note the same objection, Mr. Reporter.

Q. Did you, on or about September 19th, receive from Mr. Beardslee a letter, a copy of which is attached to your answers as Exhibit 13?

A. The letter was received at my office, yes.

Q. And did you answer that letter?

A. I did not. It is not addressed to me.

Q. But it was received at the office of The Indianapolis Gas Company?

A. It was received at the office of The Indianapolis Gas Company, yes, sir.

623 Q. And so far as you know, The Indianapolis Gas Company never answered it?

A. Not to my knowledge, no.

Mr. Burns: We offer the letter in evidence as Plaintiffs' Exhibit 113.

Mr. Thompson: The same objection, if the Court please.

Your Honor's attention is directed to the fact that this letter is addressed to Mr. William G. Irwin, and there is no proof here as to whether he answered it or not.

The Court: Well, there is no proof.

Did you say it was received at your office?

The Witness: It was received at the office, yes.

Mr. Burns: It is addressed to William G. Irwin,

President, Indianapolis Gas Company, Indianapolis, Indiana, and we will offer additional proof that no answer was received to it.

Q. Did you, about October 1st, 1935, receive the telegram from The Chase National Bank, marked Exhibit 14 and attached to your answers?

624 A. I did.

Q. And did you answer that telegram?

A. Let me get the original telegram. There is a note on it. (Procuring original telegram.)

I have a note on the corner of this telegram, dated 10-1-1935, "A. V. B. phoned Abbott."

Is that a Chase man?

Q. I haven't the slightest idea.

A. I think he phoned The Chase National Bank and phoned Abbott.

Q. Was that about the payment of the interest that was due October 1st?

A. Correct.

Q. But so far as you know, no answer was sent to the inquiry contained in the letter of September 19th, Exhibit 113, which is referred to in the telegram?

Mr. Thompson: I object to this. How can this witness know what Mr. Brown said over the telephone to Mr. Abbott of The Chase National Bank?

The Court: Objection sustained.

Mr. Burns: All I asked was whether, so far as he knew, any answer was sent.

625 The Court: I think he said a moment ago, didn't you, that it had not been answered?

The Witness: I said the letter had not been answered.

The Court: That is right.

Mr. Burns: But I asked him whether the telegram had been answered and asked him whether—

The Court: Well, he said there was a note there that Mr. A. V. B.—I suppose that is Mr. Arthur V. Brown.

The Witness: Mr. Brown.

The Court: But, of course, that doesn't mean anything because we don't know what he is talking about.

Mr. Burns: Well, he said it was his understanding that he talked about the payment of the interest, and what I asked him was whether, so far as he knew, any answer was sent to the inquiry contained in the letter of September 19th.

The Court: Well, the objection is sustained. There

has to be a line drawn some place. I have been, and I am going to be, pretty liberal all the way through 626 in the admission of evidence, but there has to be a line some place.

Q. I call your attention to a letter of October 3rd from Mr. Beardslee to you, attached to your interrogatories—your answers to interrogatories—as Exhibit 15. Did you receive this letter on or about its date?

A. I did.

Q. Did you answer it?

A. It was not answered immediately, I know. I was trying to think—

Q. As a matter of fact, calling your attention to the next letter of November 7th,—

A. That is right.

Q. (continued.) —it was not answered until November 7, 1935, was it?

A. That is right.

Mr. Burns: I will ask to have the letter of November 7th, which is Exhibit 16 to the answers to the interrogatories, marked Plaintiffs' Exhibit 116. (The letter was marked as requested.)

627 Now, we offer in evidence PLAINTIFFS' EXHIBITS 111-A, 111-B AND 111-C, and PLAINTIFFS' EXHIBITS 112 TO 116, inclusive.

Mr. Thompson: These have already been offered.

The Court: Those are the letters where I stated I didn't know what they were.

Mr. Burns: It may have been my error in offering them twice. Mr. Rabb tells me that the ruling was reserved on some of them.

Mr. Thompson: We have no objection to 114, 115 and 116.

The Court: Let them be read.

The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 114, 115 AND 116, were admitted and read in evidence.

The Court: That just leaves the other three? Mr. Rabb, is that right?

Mr. Rabb: 111, 112 and 113.

Mr. Burns: And there are three parts to 111.

The Court: That is right.

628 Mr. Rabb: There are three parts to 111.

Q. Did you, on or about December 2nd, 1935, receive a letter from Mr. Beardslee, identified as Exhibit 17 to your answers to the interrogatories?

A. I did.

Q. And did you, on February 26th, receive another letter from Mr. Beardslee, identified as Exhibit 18 to your answers?

A. I did.

Q. Between the letter of December 2nd and February 26th, did you send any answer to the inquiries made by Mr. Beardslee?

A. I don't recall that I did.

629 Mr. Burns: We offer the letters of December 2, 1935 and February 26, 1936 as Plaintiffs' Exhibits 117 and 118 respectively.

(The said documents, so offered, respectively, marked for identification PLAINTIFFS' EXHIBIT 117 and PLAINTIFFS' EXHIBIT 118, were admitted and read in evidence.)

Q. Calling your attention to Exhibit 19 attached to your answers did you write Mr. Beardslee to that effect, or the Chase National Bank, on March 2nd?

A. I did.

Q. And that was the first reply you had made to the letters of December 2, 1935 and February 26, 1936?

A. Yes, sir.

Mr. Burns: We offer in evidence the letter of March 2, 1936 as Plaintiffs' Exhibit 119.

The Court: Is there any objection?

Mr. Thompson: No, your Honor.

The Court: Let the exhibit be read in evidence.

630 (The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 119", was admitted and read in evidence.)

Mr. Burns: Mr. Taylor has called my attention to the fact that there is apparently a rule of practice here with which I am not familiar, that these written exhibits must not only be offered but must be read in evidence. I take it that does not mean I have to actually read them.

The Court: No, the offer is made, and if there is any objection we rule on that, and if it is overruled they may be considered read.

Mr. Burns: They are considered read in evidence?

The Court: Yes, the ones as to which ruling has not been reserved.

Q. The letter of November 7, 1935, Mr. Yule, which you wrote to Mr. Beardslee in response to the previous requests which have here been introduced in evidence, was the first information you had sent the Chase Bank as to the position

taken by City of Indianapolis in regard to the lease, was it not?

631 Mr. Thompson: Is the question directed to what the witness sent or the Indianapolis Gas Company sent?

Mr. Burns: Directed first to what the witness sent.

The Court: You mean as Secretary of the Indianapolis Gas Company?

Mr. Burns: I was going to come later to as far as he knew, having custody of the Indianapolis Gas Company's records, and, as far as he knew, anyone else that had custody of the Indianapolis Gas Company records.

Mr. Thompson: The only reason for sending any notice to the Chase National Bank would be that they did not know about it. It appears affirmatively from Exhibit 13 to the interrogatories that the Chase National Bank knew as early as September 19, 1935 that the City had refused to take over this leased property. What counsel is attempting to do is to say this is the first notice you sent out. It appears affirmatively here that as early as September 19, 1935
632 the Chase National Bank knew about this.

The Court: I think this only is to meet the question of whether or not they used due diligence to show what was done by the Chase National Bank as Trustee, and I think that is competent, not statements made in a letter to show what steps were taken.

Mr. Burns: That is the only purpose for which it is offered.

The Court: Go ahead and answer the question. I think the question should be as an official. I don't think in his personal capacity.

Mr. Burns: I don't think in his personal capacity he had any duty to do it, but I would like to show whether he did it or did not do it as Secretary.

(The question was read by the reporter as follows: "The letter of November 7, 1935, Mr. Yule, which you wrote to Mr. Beardslee in response to previous requests which have here been introduced in evidence, was the first information you had sent the Chase Bank as to the position taken
633 by the City of Indianapolis in regard to the lease, was it not?")

The Witness: It was.

Q. That is the first information you sent to the bank either individually or in your capacity as Secretary?

A. As Secretary. I wouldn't send it individually.

Q. So far as the records of the Indianapolis Gas Company disclose, that was the first information that anybody

connected with the Indianapolis Gas Company had sent the Trustee?

A. Yes, sir.

Q. Did you as Secretary of the Indianapolis Gas Company send the Trustee or any Bondholders any information about the proposed agreement of March 2, 1936 between the Indianapolis Gas and the City?

A. No, sir.

Q. So far as the records of the Indianapolis Gas Company disclose, did anybody connected with the Indianapolis Gas Company send the Trustee or any of the Bondholders such information?

A. Not to my knowledge.

634 Q. Did you as Secretary of the Indianapolis Gas Company write to the Trustee or to any Bondholders advising any of them of the negotiations and arrangements about making extensions to the Indianapolis Gas property?

A. No, sir.

Q. So far as you know, did anybody connected with the Indianapolis Gas Company send any such information to the Trustee or Bondholders?

A. I don't know of any.

Q. As Secretary of the Company you have charge of the books and records of the Company?

A. I have.

Q. And you are familiar with what property the Indianapolis Gas Company has?

A. In a general way.

Q. You know it is the property that it leased to the Citizens Gas Company, is that correct?

A. Yes, sir.

Q. Aside from the property leased to the Citizens Gas Company, the Indianapolis Gas Company has no property except its office furniture and fixtures, its record books, and the \$120,000.00 of Indianapolis Gas bonds. That 635 is true, is it not?

A. Yes, that is true.

Q. The office furniture and fixtures are the office furniture and fixtures you have had there the last 25 years in two little rooms up in the Majestic Building?

A. Yes, sir.

Q. They were carried on your books at how much?

A. Something over a thousand dollars.

Q. That was the cost value twenty-five years ago?

A. Yes.

Q. Would you venture an opinion as to what they are worth today?

A. Not very much.

Q. Something under a thousand dollars?

A. Under \$500.00, surely.

Q. The record books of the Indianapolis Gas are kept in that office?

A. Yes.

Q. Are those of any value except as records?

A. No.

Q. It appears in the stipulation that the \$120,000.00 of bonds owned by the Indianapolis Gas were all pledged at the Indiana National Bank.

636 A. They are.

Q. For an indebtedness of about \$28,000.00

A. Something like that, yes.

(At this point a short recess was taken.)

After recess.

Questions by Mr. Burns: (Resuming.)

Q. Mr. Yule, did you on or about September 30, 1935 receive a check for \$171,575.00 from the Citizens Gas and Coke Utility?

A. I did.

Q. The Citizens Gas and Coke Utility, as I understand it, is the name in which the Utility district does business?

A. I so understand, yes.

Q. What did you do with the \$171,575.00?

A. I deposited it in the Indiana National Bank.

Q. Did you arrange to send part of that to the Chase Bank to pay the coupons?

A. They immediately telegraphed \$168,575.00 to the Chase National Bank, Trustee, to pay the coupons.

Q. The \$3,000.00 you kept out was the \$3,000.00
637 covering the coupons held by the—

A. (Interposing.) The one hundred and twenty coupons from the bonds we held in our treasury.

Q. That the Indianapolis Gas held in its treasury?

A. Yes.

Q. It will appear subsequently, if it does not now, that the Citizens Gas and Coke Utility sent in to the Trustee the eighteen coupons that it had on its bonds on October 1, 1935, and again on April 1, 1936. Did the Indianapolis Gas Company pay any money to the Citizens Gas and Coke Utility for those coupons?

A. No, they paid no money for those.

Q. Those coupons were not paid?

A. We simply take the coupons and cancel them.

Mr. Thompson: What was the date of that check?

The Witness: The date of the check—I don't know what the date of the check was. I have it on my books September 30th. It was really deposited in the bank on the 1st, before the bank opened.

Mr. Thompson: 1935?

638 The Witness: Yes.

Q. Did you also on September 30, 1935 receive from the Citizens Gas and Coke Utility a check for \$4,780.80 to cover the quarterly income tax payment that was due on or about that time?

A. It was due on the 15th of September. I received it on the 30th of September.

Q. You had previously borrowed money to take care of that tax payment?

A. Yes.

Q. You received the money from the Citizens Gas and Coke Utility on the 30th of September?

A. That is right.

Q. Then on October 14, 1935 did you receive from the Citizens Gas and Coke Utility a check for \$1,772.46 to cover Indiana Gross Income Taxes?

A. I did.

Q. That check was used for that purpose, to pay the Indiana Gross Income Taxes?

A. Yes, sir.

Q. On November 2, 1935, or at about that time, did you receive a check from the Citizens Gas and Coke Utility
639 for \$47,761.70 to cover a half year's taxes on the property of the Indianapolis Gas Company?

A. I did.

Q. What did you do with that check?

A. I endorsed the check to the Union Trust Company who in turn I think endorsed it to the County Treasurer.

Q. You did not put that through your bank account?

A. I did not.

Q. Did you on September 13, 1935 receive a check for \$4,780.79 from the Citizens Gas and Coke Utility?

A. I did.

Q. To pay the Federal Income Tax instalment that was due December 15, 1935?

A. Yes, sir.

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642 Mr. Burns: I will say this, in the form of a stipula-
643 tion, and try to avoid any conclusions:

It may be stipulated that on December 31, 1935 the

Indianapolis Gas Company received from the Citizens Gas and Coke Utility a check for \$60,000.00, which it, in turn, used in paying a dividend of 3 per cent to its stockholders.

Mr. Thompson: Why don't you take a list of these payments and put them in, and if Mr. Hill furnished them to you—here is a complete list.

Mr. Burns: I have the list, but I want the stipulation to show, or have Mr. Yule testify, what the Indianapolis Gas used them for.

The Court: I think that is fair. That, of course, could not bind the City or anyone else as to what the Indianapolis Gas Company did with the money.

Mr. Thompson: So long as it is understood by agreeing to this stipulation I am not consenting that the payment was made in recognition of this lease, I have no objection.

644 Mr. Burns: I think that is perfectly all right. We want it clearly understood that we are not agreeing it was not so made.

The Court: That is where your differences are. If we could agree on that we might not have any law suit. Now, can you go ahead with your stipulation?

Mr. Thompson: As long as it is not construed as an admission we had paid the money for that purpose.

The Court: It will not be so construed.

Mr. Burns: It is further stipulated on January 10, 1936 the Citizens Gas and Coke Utility paid to the Indianapolis Gas \$300.00, which was used by Indianapolis Gas as corporate maintenance fee.

It is further stipulated on January 16, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas \$277.10, which Indianapolis Gas used to pay the mortgage Trustee's fees and expenses.

It is further stipulated on January 25, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas \$1,140.66,
645 which Indianapolis Gas used to pay the Indiana Gross Income Tax.

It is further stipulated on March 13, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, \$4,782.36, which Indianapolis Gas used to pay the current quarterly installment of Federal Income Tax.

It is further stipulated on March 25, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas \$171,575.00, of which Indianapolis Gas kept \$3,000.00 itself, covering its own one hundred and twenty coupons and remitted by its own check to Chase National Bank, Trustee, \$168,575.00.

It is further stipulated on April 9, 1936 the Citizens Gas and Coke Utility paid to Indianapolis Gas \$421.44, which the Indianapolis Gas in turn used to pay the mortgage Trustee's fee.

It is further stipulated on April 14, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, \$1,778.25, which Indianapolis Gas in turn used to pay the Indiana Gross Income Tax quarterly instalment.

646 It is further stipulated on June 12, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, \$4,782.36, which sum Indianapolis Gas in turn used to pay the current quarterly instalment of Federal Income Tax.

It is further stipulated on June 12, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, \$15.00 which the Indianapolis Gas in turn used to pay the \$15.00 Federal Taxes withheld on foreign-held bonds.

It is further stipulated on September 15, 1936 Citizens Gas and Coke Utility paid \$4,782.36 to Indianapolis Gas, which Indianapolis Gas in turn used to pay the Federal Income Tax quarterly instalment.

It is further stipulated on December 14, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas the sum of \$4,782.36, which sum Indianapolis Gas in turn used to pay the current quarterly instalment Federal Income Tax.

Questions by Mr. Burns (Resuming).

Q. Now, Mr. Yule, in connection with these various
647 payments that were made by Citizens Gas and Coke Utility to Indianapolis Gas, did you send to the Citizens Gas and Coke Utility bills showing the amount due for these various items as they came due from time to time?

A. I usually sent them statements.

Q. In response to those bills you would get back the check from the Citizens Gas and Coke Utility for the amount of the bill?

A. That was customary, yes.

Mr. Burns: I could also cover, although Mr. Hill and not Mr. Yule would have this information,—some other payments which were not made through Mr. Yule.

The Court: If there is no dispute about it—

Mr. Burns: (Interposing.) There is no dispute. I have been over them with Mr. Hill.

The Court: You might read them right into the record at this time.

Mr. Burns: On or about October 30, 1935 Citizens Gas and Coke Utility paid to the Chase National Bank 648 the sum of \$421.44, and the check was forwarded in a letter to the Chase National Bank, copy of which is identified as Plaintiff's Exhibit 120, and the invoice No. 33656, referred to in said letter, is identified as Plaintiffs' Exhibit 120-A.

The Court: Any objection?

Mr. Thompson: No.

Mr. Burns: I will read this letter. This is November 1, 1935, to the Chase National Bank and signed Citizens Gas and Coke Utility.

"We enclose herewith Indiana National Bank draft No. 90195 in amount \$421.44 drawn to your order. This remittance is in payment of your invoice No. 33656 covering commission for paying Indianapolis Gas Company's Bond Coupons due October 1, 1935, in like amount.

"For your convenience we attach stub of your invoice. We trust same will be found correct."

Mr. Burns: The invoice attached reads: "Commission for paying coupons due October 1, 1935 detached from Indianapolis Gas Company 5% First Consolidated Mortgage Bonds."

We offer in evidence Plaintiffs' Exhibits 120 and 120-A.

(The said documents, so offered, respectively marked for identification "PLAINTIFFS' EXHIBITS 120-AND 120-A", were admitted and read in evidence.)

Mr. Burns: It may further be stipulated that on May 4, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company of Indianapolis, \$51,361.54 in payment of the taxes on the Indianapolis Gas property.

Mr. Thompson: Which I suggest you phrase as you did the other,—which the Union Trust Company used in payment.

Mr. Burns: This was paid in taxes, and you have got the receipted bills,—as agent to receive the tax payments.

The Court: Do you have a receipt for that?

Mr. Burns: Mr. Hill has.

The Court: As I understand, the Union Trust Company was a place you would go and pay your taxes instead of going to the Treasurer's office?

650 Mr. Burns: That is right.

Mr. Thompson: Undoubtedly this money was used for paying taxes. The agreement provided for payment of certain sums of money, all under an understanding.

The Court: There would be no objection then to that stipulation?

Mr. Thompson: May I have it read?

(The reporter read as follows: "It may be further stipulated that on May 4, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company of Indianapolis, \$51,361.54 in payment of the taxes on the Indianapolis Gas property.")

Mr. Thompson: As long as it is understood on our part it was paid pursuant to the terms of an express written agreement, I have no objection to it.

Mr. Burns: We don't agree it was paid pursuant to an express written agreement.

The Court: I understand the position of each of you fully, but it was paid, as I understand, and the Union Trust Company turned over to the Utility Company 651 this receipt for the taxes.

Mr. Burns: That is the fact, is it, Mr. Hill?

Mr. Hill: The check was given to the Union Trust Company, and they took the money at the Union Trust and returned to us the receipted tax bills.

Mr. Burns: Covering the Indianapolis Gas property?

Mr. Hill: Yes.

The Court: All right. I think that is a fair statement.

Mr. Burns: It may be further stipulated on November 2, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer \$51,361.20 in payment of the state, county and city taxes of the Indianapolis Gas Company; that on May 3, 1937 the Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer, \$55,002.94 in payment of the state, county and city taxes of the Indianapolis Gas Company.

The Court: Let me ask, just for my own information, when was the agreement entered into between the Utility or City and the Indianapolis Gas Company 652 whereby these payments were made and other money placed in escrow in the bank?

Mr. Thompson: The first was dated September 30, 1935 and the second March 2, 1936.

The Court: Your position is it was agreed between the City and Indianapolis Gas Company that this Utility District would pay the taxes and deposit certain amounts?

Mr. Thompson: That is right, and I propose to prove in addition, your Honor, that the Chase National Bank

accepted money that was paid under these agreements with full knowledge of the agreements.

Mr. Burns: It is further stipulated on November 1, 1937 Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer \$55,002.91 in payment of the state, county and city taxes of the Indianapolis Gas Company; that on May 2, 1938 Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer \$59,083.24, in payment of the state, county and city taxes of the Indianapolis Gas Company; that on November 7, 1938 Citizens Gas and Coke Utility paid 653 to the Union Trust Company for the County Treasurer \$59,083.20 in payment of the state, county and city taxes of the Indianapolis Gas Company; it is further stipulated that on February 20, 1937 Citizens Gas and Coke Utility paid to various insurance companies for fire and tornado insurance upon the Langsdale Plant of the Indianapolis Gas Company the sum of \$11,770.55; that on August 5, 1936 Citizens Gas and Coke Utility paid to a fire insurance company the sum of \$575.40 for fire insurance policy that covered the Prospect and Pratt Avenue Plants jointly; and that on February 20, 1937 the Citizens Gas and Coke Utility paid a deposit premium to an insurance company in the sum of \$22,500.00 covering the Prospect Plant of the Citizens Gas and Coke Utility and the Pratt Plant of the Indianapolis Gas Company.

Questions by Mr. Burns (Resuming).

Q. Mr. Yule, when the \$168,575.00 was telegraphed to the Chase National Bank on October 1, 1935 did you at that time give the Chase National Bank any information as to the source from which that money was derived?

A. I did not.

654 Q. When the \$168,575.00 was sent to the Chase National Bank on March 25th or 26th, 1936 did you give the Chase National Bank any information as to the source from which that money was derived?

A. I think not.

Q. Or that it was sent to the Chase Bank subject to any conditions or any qualifications?

A. No.

Q. Have you the letter in which you transmitted the payment of \$168,575.00 to the Chase Bank?

Mr. Thompson: It seems to me it is perfectly obvious there are representatives of the Chase National Bank

here. Mr. Yule just knows a part of this story from the standpoint of the Indianapolis Gas Company.

Mr. Burns: Mr. Beardslee is going to be on the stand.

The Court: All right.

Q. I call your attention to a letter dated March 26, 1936. Is this the letter in which you sent the \$168,-655 & 5.00 to the Chase National Bank?

A. It is.

Mr. Burns: We offer this in evidence as Plaintiffs' Exhibit No. 121.

The Court: Any objection?

Mr. Thompson: No.

(The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 121", was admitted and read in evidence.)

Q. Have you a record here, Mr. Yule, of the additions and extensions made to the Indianapolis Gas property since September 9, 1935 by the Citizens Gas and Coke Utility as reported to you by the Citizens Gas and Coke Utility?

A. I have.

Q. Will you produce that record, please?

A. Do you want the record or a summary of it? The record is on the desk there wrapped in that package.

Q. Is this it?

A. Yes.

656 Mr. Thompson: I am perfectly willing the summary may be used.

Mr. Burns: I won't open the material if it is agreeable to use the summary.

The Witness: There is the summary of the figures.

Q. Have you another copy of this?

A. I haven't another copy here, but that is all right. I have another copy of it.

Q. Calling your attention to a paper marked Plaintiffs' Exhibit 122, is this a summary prepared by you from the reports submitted to you by the Citizens Gas and Coke Utility of the additions and improvements made to the Indianapolis Gas property since September 9, 1935 to December 31, 1938?

A. It is.

Q. That shows that in the period from September 9, 1935 to December 31, 1938 the Citizens Gas and Coke Utility has expended \$95,336.47 in additions and extensions to the Indianapolis Gas property. Is that correct?

A. It does.

Q. And it is subdivided between the Pratt Street Plant, the mains, services, and meters first installation, as 657 shown on this exhibit?

A. It is.

The Court: Is there any objection to the exhibit? I think it will speak for itself.

Mr. Burns: We offer in evidence Plaintiffs' Exhibit 122.

The Court: It may be read in evidence.

The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 122", was admitted and read in evidence.

Q. Mr. Yule, did you bring with you the minute book of the Indianapolis Gas Company?

A. I did.

Q. Rather than refer you to that, I would like to identify it at this time, so as to save recalling Mr. Yule—it appears maybe a little out of order—the minutes of the meeting of the Board of Directors of the Indianapolis Gas Company of May 12, 1936, and ask to have this photostatic copy marked "Plaintiffs' Exhibit 123-A", "B", and "C".

658 Calling your attention particularly, Mr. Yule, to a copy of a letter from Baker, Hostetler, Sidlo & Patterson, appearing on the second page of these minutes, dated May 4, 1936, did you receive that letter on or about its date? When I say "you" I mean the Indianapolis Gas Company.

A. Yes, sir.

Q. Did you, following the meeting of May 12, write to Baker, Hostetler, Sidlo & Patterson as shown by the copy of your letter set forth on the third page of these minutes?

A. I did.

Mr. Burns: I take it there will be no objection, because he has here the original letters if anybody cares to see them. I won't offer this at this time, because it is perhaps more properly rebuttal evidence.

The Court: That goes to the question in the answer?

Mr. Burns: The collusion, I think.

The Court: Let the record show these exhibits are 659 identified at this time, and there will be no objection because the original letters—

Mr. Thompson: (Interposing.) I intend to offer them, if he doesn't.

Mr. Burns: That is all, Mr. Yule.

Cross-Examination by William H. Thompson, Esq.

Q. Mr. Yule, the letter of May 4, 1936 from the firm of Baker, Hostetler, Sidlo & Patterson to the Indianapolis Gas Company was sent to you by mail?

A. Are you talking about me or the Indianapolis Gas Company?

Q. I am talking about the Indianapolis Gas Company. Did you receive it through the mail?

A. I didn't receive it.

Q. Who did receive it?

A. I don't know.

Q. Who presented it at the meeting?

A. I don't recall.

Mr. Burns: I simply identified this as out of order.
660 I think it is not proper cross-examination at this time.

I identified this simply to avoid the trouble of calling Mr. Yule back. I don't care particularly, except I think it is out of order at this time.

Mr. Thompson: If he identifies the letter I surely have a right to know how it came. Here is a letter addressed to the Indianapolis Gas Company, Indianapolis, Indiana. Is that right?

The Witness: That is right.

Q. It did not come by mail to the office of the Indianapolis Gas Company, did it?

A. I think not.

Q. Who brought it to the meeting? Mr. Higgins?

A. I don't know.

Q. The letter that you wrote under date of May 12th to the Baker firm, did you mail that or was it given to someone?

A. I mailed that letter. I wrote the letter and mailed it.

Q. Had someone prepared the letter for you to write?

A. Well, it was approved in the meeting of the Board of Directors.

Q. I am trying to find out whether you yourself
661 drafted the letter or whether it was drafted by some other person.

Mr. Higgins: The Indianapolis Gas Company. The minutes show the letter was sent on the order of the motion of the Board of Directors. Now, what officer composed the letter I think is utterly immaterial. The letter was sent by the company at the direction of the directors.

The Court: I understand you are not bound solely by just what is in the record where a charge is made as in this case. You can show under what circumstances and who prepared the letters, and all those things, to show whether there was any collusion or not.

Mr. Ewbank: My recollection would be that I prepared the letter.

Mr. Thompson: If you admit that I am willing to let it stand as the witness's answer.

Mr. Ewbank: Part of it, at least. I remember some pencil notations on the copies of it.

662 Q. Have you the originals of those two letters in your possession there?

A. Yes, I have them right here.

The Court: That was the same day the meeting was?

Mr. Ewbank: Yes, following the meeting. I think the preparation was at the meeting.

Mr. Higgins: There was a full Board present.

Q. You have nothing in connection with these letters, any preliminary drafts of these letters other than the two you have handed me, which were the final drafts?

A. I think not.

Q. Are you sure about it?

A. I suppose there must have been.

Q. I say, do you have them?

A. No.

Q. You—when I say “you” I am talking now about the Indianapolis Gas Company—received a letter from the firm of Thompson, Rabb & Stevenson as attorneys for

Department of Utilities on the 24th day of July, 1935,
663 advising the Indianapolis Gas Company that the City of Indianapolis would upon the transfer of the Citizens Gas property to the City of Indianapolis refuse to recognize the validity of the Indianapolis Gas lease?

Mr. Burns: I object.

The Court: Sustained. I think that is part of the defense. As I understand, these minutes were just identified for the purpose of using them perhaps later, so the witness would not have to be recalled.

Mr. Thompson: I was going to these payments now. What I want to show by this witness—and I will produce letters here to show—that he knew continuously from the 23rd day of July, 1935 that the City of Indianapolis was denying any obligation on the lease.

The Court: I think that is competent. I didn't know what you had in mind.

Mr. Burns: Show the objection to his reading things into the letter that we do not think are there.

664 The Court: The Court may have to read it itself.

Q. Did you receive this letter on July 23, 1935 from Thompson, Rabb & Stevenson?

A. I did not.

The Court: He means the company.

The Witness: I did not; the secretary did not.

Q. Have you ever seen the letter of July 23, 1935?

A. I have it here.

Q. Will you produce it?

A. Yes.

The Court: When they speak about "you" they mean the company of which you are secretary.

Q. I call your attention now, Mr. Yule, to an instrument identified as Defendant City's Exhibit A, and ask you when that reached the files of the Indianapolis Gas Company?

A. I think it was produced at this meeting of the Board of Directors some time in September, at the first meeting of the Board of Directors.

665 Q. Who produced it?

A. I don't know.

Q. I will ask you if it is a fact, Mr. Yule, that the first checks, being two in number, which were received by the Indianapolis Gas Company from the Board of Directors for Utilities of the City of Indianapolis, which were actually cashed by the Indianapolis Gas Company were those which were received in a letter dated September 30, 1935?

A. That is the checks that we cashed, the \$171,575.00 and—

Q. (Interposing.) The first checks that the Indianapolis Gas Company ever received from the Department of Utilities which it actually cashed?

A. That is correct.

Q. I call your attention now to Exhibit 64 to the stipulation, and ask you whether that is the letter in which the checks were enclosed, or a photostatic copy of it, I mean?

A. Yes, I think so.

Mr. Thompson: As a part of the cross-examination of this witness, we offer this letter.

Mr. Burns: We object to it as wholly irrelevant
666 and immaterial as between the City and the Trustee or the Bondholders, that no arrangement made between the mortgagor and City could in any way prejudice

the rights of the Trustee or Bondholders.

The Court: Read the letter and let us see what it says.

(The said document, Exhibit 64 to the stipulation, was read by Mr. Thompson.)

The Court: Objection overruled.

Mr. Burns: May we have an exception?

The Court: Yes. I really don't think you need to ask for it now under the rules. You may have the exception.

Questions by Mr. Thompson (Resuming).

Q. I call your attention now to Exhibit 65 to the stipulation in this case, and ask you whether that is a photo-static copy of a letter you wrote on the same day in reply to the letter identified as Exhibit 64?

A. It is.

667 Mr. Thompson: The defendant offers as part of the cross examination this letter, which is as follows:—

Mr. Burns: (Interposing.) May it be understood we have a continuing objection to this correspondence, on the grounds already stated?

The Court: Yes. As I understand, this is offered to show on what grounds these payments were made.

Mr. Thompson: Yes.

(Exhibit 65 to the stipulation was read by Mr. Thompson.)

Mr. Thompson: Now, in this connection also, your Honor, I offer City's Exhibit A, which is the letter from Thompson, Rabb and Stevenson to the Indianapolis Gas Company under date of July 3, 1935.

Mr. Burns: That has already been put in evidence by the plaintiff as Exhibit 58. It was offered and received this morning.

668 The Court: There is no necessity of having any duplications.

Mr. Thompson: There is an unsigned copy in evidence, as I understand.

669 Q. Are you familiar with an instrument, which I have and hand you?

The Court: I think, Mr. Thompson, that the last exhibit should not be read if the other is an exact copy of it and it had been received. There is no necessity of duplicating the record.

* Mr. Thompson: Beg pardon?

The Court: I see no necessity for duplication in the record.

Mr. Thompson: No, I don't want to do that. May it stand this way: If, on checking, this letter is already in, this offer may be withdrawn, and, if not in, it may stand?

The Court: That is right.

Q. I hand you, Mr. Yule, the minute book of the Board of Directors for the Utilities of the City of Indianapolis and call your attention to four pages of this minute book, containing an agreement dated March 2nd, 1936, and ask you whether the signature of The Indianapolis Gas Company, by William G. Irwin, is the signature of the 670 President of The Indianapolis Gas Company.

A. It is.

Q. And whether you signed that as its Secretary and affixed the seal?

A. I did.

Q. And whether you also furnished to the City of Indianapolis a certificate that the Board of Directors had approved the execution of this contract?

A. I did.

Q. I mean the Board of Directors of The Indianapolis Gas Company.

A. Yes.

Mr. Thompson: The City now offers in evidence, as a part of the cross examination of this witness, Pages 358, 359, 360 and 361. and also 362 of this record.

Mr. Burns: The plaintiff objects to this contract of March, 1936 on the ground that no agreement between the City and the Indianapolis Gas can in any way affect the rights of the Trustee and bondholders, and call your attention to the fact that this is one of the exhibits 671 shown in the stipulation and that apparently they are just duplicating a lot of stuff in the stipulation by putting material in in this way. We didn't offer it, but it is attached to the stipulation.

The Court: It hasn't been offered?

Mr. Burns: No.

The Court: I think this would be competent to show the position taken by the City from the start, but what effect it will have on the legal outcome, I am not prepared to say, of course. But I would not duplicate any of these exhibits.

Mr. Thompson: It is not in the stipulation.

Mr. Burns: You mean the March 2nd agreement?

Mr. Thompson: No. The March 2nd agreement was

originally contained in the stipulation, but it was taken out.

Mr. Burns: I beg your pardon. It is my mistake. It was an exhibit to your answers.

Mr. Thompson: Your Honor, the offered item, here not only contains—so counsel will be advised and your Honor, too,—not only contains the agreement of March 2nd, 672 but Page 361 is a certificate entitled, "Resolution of the Board of Directors of The Indianapolis Gas Company, approving the contract," and Page 362 is a resolution of the Board of Directors for Utilities of the City of Indianapolis, ratifying the contract.

The Court: That is the contract under which these deposits were being made and the payments of taxes—

Mr. Thompson: Yes.

The Court: (Continued)—have been made?

Mr. Thompson: That is right.

The Court: Let the record show that the exhibit is read in evidence.

The said Pages Nos. 358, 359, 360, 361 and 362 of said Minute Book, so offered, were marked CITY'S EXHIBIT B and were admitted and read in evidence.

Q. Now, Mr. Yule, when were either Judge Ewbank or Mr. Higgins first employed as attorneys for The Indianapolis Gas Company in connection with the controversy affecting this ninety-nine year lease?

A. I don't know.

673 Q. Well, it was prior to the time when any of these payments were made, wasn't it?

A. Well, I presume the record was the meeting where this was first considered at the first Board meeting, wasn't it?

Q. Well, do you know the date?

A. Well, I can look it up. It is probably about the latter part of September, 1935.

Q. All right. Now, that will be close enough for me. Now, Mr. Newton D. Baker was employed as special counsel for The Indianapolis Gas Company on the 28th day of September, 1935? Is that correct?

A. That is so recorded in the minutes.

Q. Yes. Well, that is right, isn't it?

A. Yes.

Q. Now, Mr. Arthur V. Brown, of whose name some mention has been made, was the Treasurer of The Indianapolis Gas Company?

A. Yes, sir.

Q: When you received the telegram dated October 1st, 1935, from The Chase National Bank in connection with the interest on The Indianapolis Gas Company bonds, you took that telegram to Mr. Arthur V. Brown at The 674 Indiana National Bank?

A. Yes, sir.

Q. That was received on October 1st, '35, was it?

A. Yes, sir.

Q. And Mr. Brown then had a long distance telephone conversation with whom?

A. I only know that I have a note on the corner of the telegram that it was Abbott.

Q. Was Mr. Abbott at that time an officer of The Chase National Bank?

Mr. Burns: I object unless he knows.

Q. (Continued.) Well, if you know.

A. I don't know, no.

Mr. Thompson: Well, will it be admitted that he was an officer of The Chase National Bank?

Mr. Burns: It will be admitted that there was no such officer in The Chase National Bank, if that is a fact.

Q. Mr. Arthur V. Brown is the President of The Indiana National Bank and The Union Trust Company 675 of this city?

A. I so understand, yes.

Q. He resides in Indianapolis?

A. He does.

Q. Is he in Indianapolis at this time?

The Court: He was, at noon. I saw him.

Q. So far as you know?

A. I don't know. I haven't seen him today.

Q. Now, this correspondence, to which your attention has been directed: you said that you, personally, or as Secretary of the company, had not given any notice to The Chase National Bank, prior to this first payment on September 30, 1935, of the fact that the City of Indianapolis had denied liability under this lease? Is that correct?

A. Yes, sir.

Q. You knew from an examination of Exhibit 13 to the answers of The Indianapolis Gas Company to these interrogatories, that The Chase National Bank knew, as early as September 19, 1935, that the City was claiming that this lease was invalid?

676 Mr. Burns: I object. That asks for a conclusion.

The Court: Overruled.

The Witness: What is the question now?

Mr. Thompson: Read it.

(The Reporter read the preceding question as follows: "You knew from an examination of Exhibit 13 to the answers of The Indianapolis Gas Company to these interrogatories, that The Chase National Bank knew, as early as September 19, 1935, that the City was claiming that this lease was invalid?")

A. I had seen this letter, yes.

Q. Well, it is true, in there, that The Chase National Bank calls attention to the fact that the City is attempting to abrogate the lease?

A. Yes.

Mr. Burns: I object to characterizing the letter by saying something that isn't said there.

The Court: Is the letter in evidence?

Mr. Burns: Yes, it is in evidence.

677 Mr. Thompson: I will put it in evidence.

Mr. Burns: I will put it in evidence.

The Court: It may have been one of those that were not admitted. I don't know.

Q. Now, after this controversy arose—that is, after the transfer of this property—you don't mean to say to the Court that you conducted all of the negotiations or correspondence or dealings that were had between The Indianapolis Gas Company and The Chase National Bank, that you, on behalf of The Indianapolis Gas Company, were the only person engaged in dealing with The Chase National Bank?

A. As far as I had knowledge. I didn't know anything about it.

Q. Don't you know that Mr. Brown was in touch with The Chase National Bank?

A. I don't know it, no. I can assume it, I suppose.

Q. Didn't you yourself write a letter to an officer of The Chase National Bank, arranging a conference in New York, which was to be attended by Mr. Brown and Mr. Higgins? You may read it, now. That is Exhibit 19

to your answers. It is addressed to The Chase
678 National Bank, Trust Department, and attention of

Mr. P. C. Beardslee, Assistant Trust Officer. "Referring to your letter of February 26th in respect to any recent developments in the negotiation between this company and the City, affecting our lease, we wish to say that the company expects to have a representative in New York early next week, who will advise you fully regarding this

matter. Signed, "Indianapolis Gas Company, By William J. Yule, Secretary".

A. Yes, sir.

Q. Who was that representative that is referred to in this letter?

A. I don't know.

Q. When you wrote this letter, you didn't know who would go to that meeting?

A. No, I don't think I did.

Q. Why, didn't you know that both Mr. Arthur V. Brown and Mr. William Higgins intended to, and did, attend this meeting that was being arranged to take place in New York on March 11th?

A. I didn't know anything about any meeting on 679 March 11th, though.

Q. What does this letter mean, then? I would like to have you explain it to the Court. You may look at it (handing letter to witness).

A. Well, it means just what it says. Mr. Brown told me to write the letter, and that is all I know.

Q. Well, that comes to the point, then, that, so far as your correspondence with The Chase National Bank and your knowledge of this situation were concerned, you merely did what you were told to do?

A. Well, I did whatever the Board of Directors directed me to do, yes.

Q. That is right?

A. Yes.

Q. But you did not have any independent control over any negotiations with The Chase National Bank, or the dealings with it?

A. No, no.

Q. No. And the matters of that kind were handled either by the attorneys for The Indianapolis Gas Company or by Mr. Brown or by Mr. Irvin?

A. So far as I know, yes.

680 Q. And you had no discretion which you were permitted to exercise in the premises?

A. I expect not.

Q. Now, were you asked by either Mr. Brown or any other person to furnish a copy to him of the agreement of March 2nd, which has been introduced in evidence here, between the City of Indianapolis, its Department of Utilities, and The Indianapolis Gas Company, to take with him to this meeting in New York with the representatives of The Chase National Bank?

A. I don't recall anything like that.

Q. Do you know whether Mr. Brown or Mr. Higgins had copies of that agreement?

A. I do not.

Q. Now, the City of Indianapolis paid to The Indianapolis Gas Company the sum of \$171,575 on March 25, 1936? Is that correct?

A. That is correct.

Q. And you took out, for The Indianapolis Gas Company,—the check was made payable to The Indianapolis Gas Company?

A. It was.

681 Q. You took out three thousand dollars?

A. Yes, sir.

Q. Which you used to pay the semi-annual installment of interest on one hundred and twenty thousand dollars worth of bonds held by The Indianapolis Gas Company in its treasury?

A. I didn't pay it, no. It wasn't necessary to pay it.

Q. Well, you took it out, anyway?

A. I just didn't pay that much interest on the bonds. They were treasury coupons.

Q. I see, and you forwarded the balance to The Chase National Bank?

A. That is right.

Q. That balance consisting of \$168,575?

A. Yes, sir.

Q. Now, was a part of that to pay the fee of The Chase National Bank for distributing the interest on the bonds?

A. No.

Q. Was that forwarded to them at some later time, the fee for distributing that amount?

A. We received a check from the Citizens Gas & 682 Coke Utility for that amount and forwarded it to

The Chase National Bank for services in disbursing the coupon interest.

Q. Yes, and you did not attend the meeting of March 11, 1936, in New York City?

A. I did not.

Q. And you have no knowledge as to what occurred there?

A. I do not, no.

Q. And you have no personal knowledge as to whether The Chase National Bank accepted this sum of \$168,575 under the terms of the agreement of March 2nd, 1936?

A. I do not, no.

Mr. Thompson: That is all.

The Court: That is all.

Mr. Burns: Just a minute, Mr. Yule.

Redirect Examination by Mr. Burns.

Q. You said that Judge Ewbank, or Judge Ewbank said that he prepared this letter of May 12, 1936, or helped in drafting it at the Directors' meeting?

A. Judge Ewbank was a Director.

Q. Of The Indianapolis Gas Company?

683 A. He was.

Q. And a regular attendant at the meetings?

A. Yes.

Q. And Mr. Higgins also was a Director?

A. He was also.

The Court: Is that all?

Mr. Higgins: I have one question, your Honor.

Cross-Examination by Mr. Higgins.

Q. As to the note on the telegram, Mr. Yule, that you have already testified about, had you any knowledge of what that signified except what you have since learned?

A. Well, may I make a statement as to what that means?

Q. Yes.

A. We received a check, the day before, and we wrote that letter, acknowledging it, and said that, "If that is the understanding, we will use it tomorrow morning," and then I went to the bank, before the bank opened, on the morning of the 1st, and deposited that money and the bank wired it to New York and, then, at eleven
684 o'clock, when I got back to the office, I found this telegram to Mr. Irwin, and I delivered it right to Mr. Brown and he put in a long distance call to The Chase National Bank. I had a note that he was talking to a man named Abbott. I may have been mistaken, if there is no such officer there.

Q. The note was made by you, was it?

A. I made the note on the corner of the telegram. That is the only recollection I have of what I wrote there. That was about eleven o'clock in the morning of the 1st.

Q. After the money—

A. After the money had been telegraphed before nine o'clock in the morning.

Mr. Higgins: That is all.

The Court: That is all.

Witness excused.

The Court: I think we had better adjourn at this time. I think you should take the stipulation and the exhibits that have been offered.

685 Would it be satisfactory to meet at nine-thirty in the morning instead of ten?

Mr. Thompson: That is satisfactory to us, your Honor.

Mr. Burns: It would be a little more convenient for me if it be ten o'clock. The reason is that some people are coming from out of town, in the morning, and I don't know just what time they will get here.

The Court: As you know, I only allotted two days for this trial.

Mr. Burns: Yes. Well, I am very anxious to get through with it.

The Court: Perhaps a half hour would permit us to finish tomorrow. If that isn't satisfactory, we can make it ten.

Mr. Burns: I can be here at nine-thirty.

Mr. Ewbank: Nine-thirty, then?

The Court: Will that be satisfactory to the rest of you? (No audible response.)

Adjourn court until nine-thirty in the morning, Mr. Marshal.

Whereupon, the trial was adjourned until tomorrow, Friday, March 3, 1939, at nine-thirty o'clock A. M.

687

Indianapolis, Indiana,
Friday, March 3, 1939,
Nine-thirty O'clock A. M.

The court met pursuant to adjournment, and the trial was resumed as follows:

Mr. Burns: I would like to recall Mr. Yule for the purpose of correcting a date on one of the exhibits.

WILLIAM J. YULE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Redirect Examination by Mr. Burns.

Q. Mr. Yule, calling your attention to Plaintiffs' Exhibit 122, statement of the additions and betterments made by the City to the Indianapolis Gas system, as reported by the Citizens Gas & Coke Utility, from September 9 to June 30, 1938. That figure should correctly be December 31, 1938, should it not?

A. Yes, sir.

Mr. Burns: Would it be all right for Mr. Yule 688 to change it?

Mr. Thompson: Certainly.

Mr. Burns: Mr. Yule has now changed the date of June 30, 1938 to December 31, 1938, and we offer the exhibit as changed.

The said document, changed as aforesaid, so offered, was admitted and read in evidence.

Q. Mr. Yule, just before adjournment, Mr. Higgins had asked you about the telephone conversation which Mr. Brown had with somebody in New York. Did you take that telegram to Mr. Brown's office?

A. I did.

Q. The telegram of October—

The Court: He went over that yesterday and said that he made the note on the telegram.

Q. Yes, and did you stand there while Mr. Brown telephoned?

A. I did.

Q. Could you hear Mr. Brown's end of the conversation?

689 A. I did.

Q. Tell us, if you will, what that conversation was.

Mr. Thompson: To which the defendant City objects.

The Court: Objection sustained. Mr. Brown is available, and this witness doesn't know whom he talked to, but only what he heard.

Q. Was anything said by Mr. Brown about the correspondence which accompanied the check that The Indianapolis Gas Company had received from the City?

Mr. Thompson: To which question the defendant City objects.

The Court: Objection sustained.

Mr. Burns: Note an exception.

The Court: There is no reason why you can't have the witness here. He is within three blocks.

Mr. Burns: I am perfectly willing to have him here.

The Court: That is the way to prove it.

Mr. Burns: This witness heard the conversation.

The Court: He doesn't know whom he talked to or anything about it except what he heard. That, of course, is hearsay. You can have Mr. Brown here, if you want to, and have him testify.

Is that all with this witness?

Mr. Burns: That is all.

Witness excused.

Mr. Higgins: I will have Mr. Brown here any time you say.

GEORGE HILL, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. What is your name, your age, your address and your occupation, Mr. Hill?

A. George Hill; Room 200 Majestic Building; sixty-one; Auditor of Citizens Gas & Coke Utility.

Q. How long have you been Auditor of the Citizens Gas & Coke Utility?

A. Since December 10, 1929.

691 Q. Well, you were Auditor of the Citizens Gas Company until September 9, 1935?

A. That is right.

Q. And since then you have been Auditor of the Citizens Gas & Coke Utility? Is that correct?

A. Except during the time in which I was acting Auditor.

Q. Yes. Before you became Auditor of the Citizens Gas Company, were you employed there with the company?

A. I was.

Q. And in what capacity?

A. Assistant Auditor.

Q. Assistant Auditor, and during what time were you Assistant Auditor?

A. Well, I began work with the Citizens Gas Company of Indianapolis on July 2nd, 1917 and, about one year after that, I became Assistant Auditor.

Q. And from about 1919, when you became Assistant Auditor, were you Assistant Auditor until 1929?

A. That is right.

Q. And then you were Auditor from then until September 9, 1935?

A. That is right.

692 Q. And then, beginning September 9, 1935, you were Acting Auditor of the Citizens Gas & Coke Utility?

A. Yes, sir.

Q. And when did you become Auditor of the Citizens Gas & Coke Utility?

A. Well, I don't remember that date. It was about a year later.

Q. About a year later. As Auditor of the Citizens Gas Company, did you have charge of the books and records, the accounting books of the company?

A. I did.

Q. And the people who kept the books and accounts of the company were under your general direction and supervision?

A. They were.

Q. Did you from time to time, as Auditor of the company, have charge of the preparation of material to be sent to Poor's Manual or Moody's Manual?

A. That was usually done—that was usually sent by the Secretary.

Q. That was usually sent by the Secretary?

A. Yes, sir.

693 Q. That was by Mr. Forrest when he was there?

A. Or his secretary.

Q. Or his secretary, but did you have charge of the preparation of the accounting data for that purpose?

A. Part of it.

Q. Part of it. Would you prepare those statements annually and send them?

A. I don't remember as to those particular companies—how many we reported to. I know there were some.

Q. You know there were some. Would those companies send back the proof of what they were going to print?

Mr. Thompson: I object to this because this witness says that he didn't have charge of it.

The Court: Well, if he saw it and knows something personally about it.

The Witness: No, so far as I know—

Q. You didn't see the proof?

A. No.

Q. But you did have charge of preparing the accounting data that went into those reports?

A. Yes.

694 Q. And that accounting data, which you prepared, was then given to Mr. Forrest or his assistant and forwarded by him to any of these companies?

Mr. Thompson: Just a moment. I want to ask a question for the purpose of making an objection.

What you did do was to furnish certain accounting data to Mr. Forrest? Is that it?

The Witness: That is right.

Mr. Thompson: And you have no knowledge as to what he did with it?

The Witness: No, sir.

Q. But you do know it was prepared for the purpose of sending to these information services?

A. I know that we had a form with certain statistical companies' names on it.

Q. And those forms you filled out, showing the names of the directors and the earnings and so forth?

A. No, I didn't. No, I didn't fill that part of it out.

Q. You filled out just the accounting data to be sent in? Is that correct?

A. Yes, sir.

695 Q. And the rest of the information, you don't know who filled it out on the reports?

A. No, sir.

Q. Has the Citizens Gas & Coke Utility made similar reports to any of these services?

A. Any of them? I am not prepared to answer on that.

Q. You don't know?

A. No.

Q. You have not had anything to do with preparing any information, during the last three years and a half, for any such—

A. For some, but I don't remember the names of the statistical companies.

Q. You know that the Citizens Gas & Coke Utility has sent such information in to some of these statistical services, but you don't know which ones?

A. I don't know whether they were sent or not. I prepared the same figures and turned them over to someone else.

Q. And to whom did you turn them over?

A. Mr. Seiter or Mr. Burns.

Q. Mr. Seiter or Mr. Burns, but, after that, you 696 don't know what happened to them?

A. That is right.

Q. Mr. Seiter and Mr. Burns, neither of them were with the Citizens Gas Company, were they?

A. No, sir.

Q. They have come with the Citizens Gas & Coke Utility since the City took over the property?

A. Yes, sir.

Q. You were here yesterday and heard Mr. Yule's testimony about the addition and improvements that had been made by the Citizens Gas & Coke Utility to The Indianapolis Gas Company properties since September 9, 1935?

A. Yes, sir.

Q. You were subpoenaed to bring the figures showing the maintenance, the expenditures for maintenance, of the Citizens Gas & Coke Utility on the Indianapolis Gas property. I am not interested particularly in the exact figures, but it is a fact, is it not, Mr. Hill, that during the period from September 9, 1935 to the present time the Citizens Gas & Coke Utility has spent varying amounts for the maintenance of the distribution system of The Indianapolis Gas Company?

697 A. They have.

Q. It has or whatever—

A. Yes, sir.

Q. And has also spent varying amounts for the maintenance of the Pratt Street Station? Is that what you call it?

A. That is right.

Q. The Pratt Street Station is also Indianapolis Gas property?

A. Yes, sir.

Q. And has also spent various amounts for maintenance of the Langsdale property of The Indianapolis Gas Company?

A. Yes, sir.

Q. As a matter of fact, at the present time, the only part of the Langsdale property that has been in use is the large storage tank and the compressor rooms and the steam boilers for using the compressor rooms? Isn't that true?

A. I think so.

Q. So that very little, during the period from 1935, has

been spent on the maintenance of the other equipment at
Langsdale?

698 A. That is right.

Q. The answer was "Yes"?

A. Yes, sir.

Q. In your work as Auditor of the Citizens Gas Company, did you from time to time prepare accounting material to be furnished to Blodgett & Company or The Union Trust Company or anyone else or Gavin L. Payne & Company or any other broker or banker who was engaged in marketing securities of the Citizens Gas Company?

A. I did not, after I became Auditor.

Q. You did before you became Auditor?

A. No, sir.

Q. You say you did not?

A. I did not.

Q. You did not, after you became Auditor?

A. No, nor before.

Q. Or before?

A. That is right.

Q. You didn't do it at any time while you were at the Citizens Gas Company?

A. No, sir.

Q. Beg pardon?

699 A. No, sir.

Q. Was any such work done under your direction as Auditor?

A. No, sir.

Q. Who did that work at the Citizens Gas Company?

A. I don't remember of any Blodgett reports being made.

Q. You don't remember of any accounting data being assembled for that purpose,—

A. For Blodgett?

Q. (continued)—while you were at the Citizens Gas Company?

A. No, sir.

Q. Your subpoena called for you to bring in the annual report of the Citizens Gas Company for the year ending December 31, 1913. Did you find that?

A. Yes, sir.

Q. May I see it? (The witness handed document to counsel.)

Calling your attention, Mr. Hill, to this paper that you have brought in, is that the annual report of the Citizens

Gas Company for the year ending December 31, 1913, which you have taken from the old files of the Citizens Gas Company?

700 A. It is so stated on this report, and it was taken from the files of the Citizens Gas Company.

Mr. Burns: May it be stipulated that this is a duplicate original of the report used by Mr. Gavin L. Payne, which has already been introduced in evidence as Plaintiffs' Exhibit 93?

Mr. Thompson: I know nothing about it, Mr. Burns.

Mr. Burns: We will ask to have it marked Plaintiffs' Exhibit 124. I hesitate to mark this because it is an exact duplicate of what we offered yesterday, but Mr. Thompson says he will not stipulate that it is a duplicate.

Mr. Thompson: I don't know anything about it, Mr. Burns.

Mr. Burns: Well, it is right here.

The Court: Where is the other one? Haven't you the original that was put in yesterday? Why don't you use that to examine this witness instead of this one?

Q. Calling your attention, Mr. Hill, to Plaintiffs' Exhibit 93, that was offered in evidence yesterday in
701 connection with the testimony of Mr. Payne, is that an exact copy, a duplicate original, of the report which you have produced here from the files of the Citizens Gas Company?

A. It is so marked and it has the same date and looks as though it were printed from the same plate.

Mr. Thompson: Your Honor will recall I made no objection to this other exhibit on the ground that it was not shown to have been an original.

Mr. Burns: Will you now stipulate that it is?

Mr. Thompson: I see no purpose in making a stipulation in connection with an offering of it, your Honor.

The Court: Why don't you withdraw the other exhibit and insert the original, if you want to?

Mr. Burns: Well, one isn't any more an original than the other. The one that was produced from Mr. Payne's files was one which he had received as the person who was floating the securities, but, in order to save time, I will offer Plaintiffs' Exhibit 124.

Mr. Thompson: I make the same objection to this, your Honor.

702 The Court: That is the other exhibit?

Mr. Burns: That is the copy that Mr. Hill has produced.

The Court: I am not sure whether I ruled on the other one or not.

Mr. Burns: I think there was no objection made to it except that it was not binding on the City.

Mr. Thompson: I make the same objection to this.

The Court: Was the other one read in evidence or was the ruling reserved?

Mr. Thompson: I think it was reserved, your Honor, but I am not sure.

Official Reporter: Exhibit 93 was admitted.

The Court: Let this be read in evidence. The ruling was reserved with respect to several of them.

Mr. Burns: Yes.

The Court: I didn't remember about this.

The said document, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 124, was admitted and read in evidence.

703 Mr. Burns That is all.

The Court: That is all.

Witness excused.

PAUL C. BEARDSLEE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Beardslee, will you state your name, your age, your occupation and your address, please?

A. My name is Paul C. Beardslee; age, forty-eight; business address, 11 Broad Street.

Q. New York City?

A. New York City. Occupation, banking.

Q. What is your official connection with The Chase National Bank of the City of New York, the plaintiff in one of the two cases here on hearing?

A. I am Assistant Trust Officer of The Chase National Bank.

Q. And how long have you held that office?

704 A. Since 1931.

Q. And before 1931, had you held similar offices in other banks in New York?

A. That is true, in the Trust Departments.

Q. In the Trust Department?

A. Corporate Trust Departments.

Q. Have you been in general charge of the work of The

Chase National Bank, as Trustee of the Mortgage dated October 1, 1902 from The Indianapolis Gas Company?

A. I have, subject to approval of an executive vice president on matters of policy.

Q. And I suppose, also, the management committee or the board of directors?

A. And the management committee of the Trust Department.

Q. Over what period have you had charge of this trust relating to the mortgage of 1902?

A. It goes back at least to 1934.

Q. Do all matters in connection with that trust come to your attention, other than mere routine matters, in the ordinary course of the operation of the Chase Bank?

A. Yes, other than routine matters.

Q. So that if any information comes into the bank, 705 either in the form of a letter or a telegram or any other way, in the ordinary course of business, it comes to your attention?

A. It would reach my desk, yes.

Q. The stipulation which has been offered here in evidence shows that of the coupons dated April 1st, 1936 \$775 principal amount have not been cashed. Do you know or have you any means of finding out who the owners of those coupons are?

A. No, those coupons are payable to bearer.

Q. When the coupons were paid on the last coupon paying date, on April 1st, 1936, did you then make up as complete a list as you could of the corporate holders of the bonds of the Indianapolis Gas?

A. Yes, we did.

Q. And did you also secure a list from the Indianapolis Gas, made up from the ownership certificates showing the individual holders of those bonds?

A. Presumably it came from that list. I don't know because I don't know where they compiled it from.

Q. But they supplied you a list?

A. They supplied us with a list.

706 Q. Now, in the ordinary course of your operation at the bank, when the coupons are cashed for an individual, they come in with an ownership certificate and those—please answer out loud so the Reporter will get your answer.

A. That is true.

Q. And those ownership certificates are sent right to the company issuing the bonds? Is that true?

A. Along with the canceled coupons, in most cases.

Q. Yes.

A. That is the ordinary course.

Q. But as a result of the list which you secured from the Indianapolis Gas and the list of the corporate holders which you secured yourselves in New York, do you have a complete list of the bondholders covering those sixty-eight hundred and eighty-one bonds?

A. No.

Q. The bonds, as I understand it, are all in the denomination of one thousand dollars each?

A. That is correct.

Q. Did you ever have any intimation, prior to September 9, 1935, that the City of Indianapolis was either denying the validity of the lease of September 30, 1913 or the enforceability of that lease against it or against its properties that it had received from the Citizens Gas Company?

A. No.

Q. If any such information had come to the Chase Bank, would that information, in the ordinary course of business, have come to your attention?

A. It would have reached my desk.

Q. Now, calling your attention to Plaintiffs' Exhibit 111-A and 111-B, identified yesterday by Mr. Yule, did you write Mr. Yule, about July 19th, 1935, enclosing a copy of a letter from Scudder, Stevens & Clark, as shown by those two exhibits?

A. I did.

Q. Did you, on or about August 18th or 19th, receive from The Indianapolis Gas Company a copy of a letter to Scudder, Stevens & Clark, which has been identified as Plaintiffs' Exhibit 111-C?

A. We did. The Trustee did.

Mr. Burns: We offer in evidence Plaintiffs' Exhibits 111-A, B and C.

708 The Court: I think the offer has already been made.

Mr. Burns: I thought perhaps we ought to offer them after this further identification.

The Court: One time is enough, and the ruling was reserved, as I remember, on those. 14, 15 and 16 were admitted. One offer is enough.

Q. Calling your attention to Plaintiffs' Exhibits 112 and 112-A, did you, on or about September 6th, send to Mr. Yule the letter, 112, enclosing a copy of the letter from

Russell Berg & Company, dated September 4th, as shown by these two exhibits?

A. I did.

Q. Did you receive any response from The Indianapolis Gas Company or from Mr. Yule to that letter of September 6th?

A. No.

Q. Or did you receive any copy of any letter sent by Mr. Yule or anybody representing The Indianapolis Gas Company to Russell Berg & Company?

A. No.

Q. Did you write to Mr. Irwin, President of The 709 Indianapolis Gas Company, on September 19th, as shown by Plaintiffs' Exhibit 113?

A. I did.

Q. And when did you first receive any response to that letter of September 19th from the Indianapolis Gas—when did you receive any response from The Indianapolis Gas Company to that letter of September 19th?

A. On or about November 7th.

Q. You received a letter dated November 7th, Exhibit 116? Is that true?

A. That is true.

Q. Probably a day or two after its date?

A. Along about that time.

Q. Had you, in the meantime, between September 19th and November 7th, received any response or word from anyone connected with The Indianapolis Gas Company to your letter of September 19th?

A. No.

Q. Did you on October 1st, 1935 telegraph The Indianapolis Gas Company, as shown by Plaintiffs' Exhibit 114?

A. That is correct.

Q. And did you then, later, on October 3rd, write 710 Mr. Yule, as shown by Plaintiffs' Exhibit 115?

A. Yes, I did.

Q. Now, calling your attention particularly, Mr. Beardslee, to the last line of the first paragraph of the letter of October 3rd, Exhibit 115, in which you say, "We also wired him on September 1st with respect thereto," was that date, September 1st, a typographical error?

A. It was. It should have been October 1st.

Q. Intended to refer—

A. To the telegram of October 1st.

Q. Exhibit 114?

A. That is correct.

The Court: Just correct that in pencil.

Q. After you received the letter of November 7, 1935, from The Indianapolis Gas Company, did you write the Gas Company or Mr. Yule on December 2nd, as shown by Exhibit 117?

A. I did.

Q. And did you receive a reply to that letter—

A. No, sir.

Q. (Continued.) —from anybody connected with 711 The Indianapolis Gas Company or from Mr. Yule or from the company itself?

Q. Did you again write to The Indianapolis Gas Company on February 26th, 1936, as shown by Plaintiffs' Exhibit 118?

A. I did.

Q. And did you, in response to that letter, receive a letter from The Indianapolis Gas Company, Plaintiffs' Exhibit 119?

A. I did.

Q. Now, Mr. Beardslee, Plaintiffs' Exhibit 119 from Mr. Yule says, "Referring to your letter of February 26th in respect to any recent developments in the negotiations between this company and the City affecting our lease, we wish to say that the company expects to have a representative in New York early next week, who will advise you fully regarding this."

Was there then some correspondence between you and The Indianapolis Gas Company saying that you would be glad to see them, or something of that sort?

A. Yes, sir.

712 Q. And in pursuance of that correspondence, did Mr. Higgins and Mr. Brown, representing the Indianapolis Gas Company, come to New York on March 11th?

A. They did.

Q. And come into the office of the Chase Bank to give the information that you had requested?

A. That is correct.

The Court: That is in '36, isn't it?

Mr. Burns: That is March 11, 1936.

The Witness: That is March 11, 1936.

Q. What occurred at that meeting of March 11, 1936? What information did Mr. Brown and Mr. Higgins give you?

A. Well, at this meeting on March 11th, which was attended by Mr. Higgins and Mr. Brown, of the Indianap-

olis Gas, Mr. Rowe of the Massachusetts Mutual Life Insurance Company, Mr. Kugler of the New England Mutual Life Insurance Company, Mr. Stearns of Estabrook & Company, investment bankers, I was also present, representing the Trustee, and counsel for the Trustee.

Q. That was Mr. Cole?

A. That was Mr. Cole.

713 Q. Of Milbank, Tweed & Hope?

A. Of Milbank, Tweed & Hope. Mr. Higgins and Mr. Brown told us of the situation, the position that the City had taken with respect to the lease and also with respect to the—and told us of the March 2nd, 1936 agreement.

Q. Did they at that time give you or show you a copy of the March 2nd agreement?

A. I didn't see it.

Q. They didn't give you one there at that meeting?

A. No, sir.

Q. Well, what occurred after that?

A. Then a discussion was had as to the best method of protecting the interests and rights of the bondholders. Foreclosure was discussed.

Q. As a possible method of protecting—

A. A possible method of protecting the rights and finally I was asked, on behalf of the Trustee, as to what the Trustee's reaction would be if it were asked to bring a bill—bring a suit, to determine the validity of the lease, against the City.

The Court: I didn't understand that. You were
714 asked what?

The Witness: What the reaction of the Trustee would be to bringing a suit, to determine the validity of the lease, against the City.

The Court: Who asked you that?

The Witness: Well, this is a conversation that happened three years ago and at a round table discussion and I wouldn't—

The Court: That might be very important in this litigation.

The Witness: I couldn't say definitely.

The Court: Well, what is your best judgment?

The Witness: That might have come from either Mr. Brown or Mr. Higgins. I couldn't say definitely. It is three years ago.

Q. You don't remember whether it came from Mr. Brown or from Mr. Higgins or Mr. Rowe or Mr. Kugler or Mr. Stearns?

A. I don't know.

Q. But you do know that it developed during the conversation?

A. That was one of those things that developed, 715 but who originally started it I couldn't say definitely.

Q. Was there some further discussion as to the advisability of a foreclosure and did Mr. Brown or Mr. Higgins have anything to say as to the desirability of foreclosure proceedings?

A. Yes, there was a further discussion of foreclosure and Mr. Brown or Mr. Higgins pointed out that foreclosure would delay the proceedings and possibly cause a lot of additional expense.

Q. Mr. Brown and Mr. Higgins indicated that they didn't want the Trustee to bring foreclosure proceedings?

A. That is true.

Q. And what was the position of the bondholders in regard to that?

A. Well, the bondholders, as I recall it, were leaning toward foreclosure.

Q. And you, representing the Trustee, or Trustee's counsel, expressed what opinion?

A. Well, I told them, in response to that question, as to what the reaction of the Trustee would be. I told those present that was something on which I could not bind the bank, and it would have to be submitted to the 716 ament committee of the Trust Department.

Q. Well,—go ahead.

A. But I did intimate that if it was my own choice—my own opinion, that if we were requested to do so, to bring this suit by a substantial amount of the holders of the bonds, and if we were indemnified by the bondholders, that we might do so.

The Court: Which suit do you have reference to, the foreclosure?

The Witness: No, I am speaking now of determining the validity of the lease against the City.

The Court: Declaratory judgment case?

The Witness: That is what you call it, I guess.

Q. Was the possibility of a declaratory judgment suit, as such, discussed at that meeting, do you know?

A. Yes, I think it was.

Q. You know what a declaratory judgment suit is as distinguished from an ordinary suit?

A. I am not a lawyer, but I have an idea; but nothing definite was decided at that meeting, because the bond-

holders seemed to be rather reluctant to put up indemnity.

Q. They expressed themselves as not wanting to put up the indemnity, is that correct?

A. That is correct.

The Court: The bondholders finally put up indemnity for this Chase National Bank suit?

The Witness: No, sir.

Q. Did you have a later meeting—have you told everything that you can recall at present about the meeting of March 11th?

A. I think that is all.

Q. In any case, no definite decision was reached at that meeting about what action the Trustee would take?

A. That is correct.

Q. And the bondholders did not directly commit themselves as to whether they would or would not give indemnity?

A. That is true.

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723 Q. Did you, sometime after April 13, 1936, receive letters from the Massachusetts Mutual Life Insurance Company, dated April 16th, 1936, marked Plaintiffs' Exhibit 125, and from the New England Mutual Life Insurance Company, dated April 17th, 1936, marked Plaintiffs' Exhibit 126, copies of which I show you—125 and 126?

724 A. We did receive the original of which this is a photostat sometime about April 18th or 19th, 1936.

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727 Mr. Burns: Exhibits 125 and 126, any objection to them?

Mr. Thompson: None whatever.

The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 125 and 126, were admitted and read in evidence.

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730 Q. Mr. Beardslee, when was the first time you received any information as to the agreement of March 2, 1936 having been made between the City of Indianapolis and the Indianapolis Gas Company?

A. At the conference on March 11, 1936.

Q. Had you, prior to that time, known anything about any such agreement?

A. We had not.

Q. Or anything about the exchange of correspondence

between the City and The Indianapolis Gas Company, 731 of September 30, 1935?

A. No.

Mr. Thompson: I should think the witness would look at the letter he received under date of November 7, 1935 before he lets that answer stand.

(The Reporter read the preceding record as follows:

Question: "Had you, prior to that time, known anything about any such agreement?" Answer: "We had not."

Question: "Or anything about the exchange of correspondence between the City and The Indianapolis Gas Company, of September 30, 1935?" Answer: "No.")

732 A. Well, that doesn't refer to the March 2nd agreement.

Q. Calling your attention to the third paragraph of that letter of November 7, 1936, Mr. Beardslee, it does refer to the fact that the Company through its Board of Directors entered into a stipulation with the City of Indianapolis providing that the Board of Utilities will continue the operation of the property of this Company for a period of six months pending negotiations, and it will pay a monthly rental for such period equal to the amount of the rental under the lease?

A. That is true.

Q. So you knew that fact, that that agreement had been made?

A. For the six months period.

Q. You did not know or have any copies of the correspondence exchanged on September 30th?

A. No.

Q. And this letter of November 7th was the first information that you had of the terms under which the City and the Indianapolis Gas were allowing the property to be operated?

A. Yes, that is true.

Q. If any information as to the City's position 733 on the lease had come to the attention of the officers or employees of the Chase Bank, would that in the ordinary course of business come to your attention?

A. It would have reached my desk.

Q. When did it first come to your attention that the City of Indianapolis and the Indianapolis Gas Company had entered into any arrangement by which the City of Indianapolis would make additions and extensions to the Indianapolis Gas property pending settlement of the dispute about this lease?

A. I never heard of that.

Q. You heard of—

A. (Interposing.) Until you asked me the question yesterday.

Q. Were you consulted, or the Chase Bank consulted, in any way before that agreement was made?

A. No.

Q. If any one at the Chase Bank had been advised or consulted about that, would that have come to your attention in the ordinary course of business?

A. That would have come to my attention.

Q. When the Chase Bank received notice on October 1, 1935 that the Indiana National Bank had credited \$168,575.00 to it for the purpose of payment of Indianapolis Gas coupons did you have any information as to the source from which that money had come?

A. None whatsoever.

Q. Or the circumstances under which it was paid?

A. No, sir.

740 Q. Mr. Beardslee, did you on or about October 21, 1935 receive a letter from the Citizens Gas and Coke Utility, copy of which I show you, marked Plaintiffs' Exhibit 131?

A. We did.

Q. Were there enclosed with that letter eighteen coupons maturing October 1, 1935 of the Indianapolis Gas bonds?

A. There were.

741 Q. Did you on or about May 1, 1936 receive a letter from the Indianapolis Gas Company marked Plaintiffs' Exhibit 132?

A. We did.

Q. Were there enclosed with the letter from the Indianapolis Gas Company one hundred and thirty-eight coupons due April 1, 1936?

A. There were.

Q. Was any money paid by the Chase Bank to the Citizens Gas and Coke Utility for the eighteen coupons received on October 21, 1935 or for the one hundred and thirty-eight coupons received in the letter of May 1, 1936?

A. Not by the Chase Bank.

Mr. Burns: I offer the two letters in evidence, Plaintiffs' Exhibits 131 and 132.

The said documents, so offered, respectively marked for

identification PLAINTIFFS' EXHIBITS 131 and 132, were admitted and read in evidence.

Q. Did you have any information prior to March 2, 1936, Mr. Beardslee, that there were any negotiations between the City and Indianapolis Gas Company looking towards the making of the agreement of March 2, 1936?

A. No, sir.

742 Q. As a matter of fact, the first information you got about that at all was at the meeting of March 11, 1936?

A. That is correct.

Mr. Burns: That is all.

Mr. Thompson: Your Honor, may we have a recess for a few moments?

The Court: Yes, I will take about a ten-minute recess.

After Recess.

Mr. Burns: If the Court please, Mr. Brown is here, and I think we can dispose of him in about one minute, if counsel will agree we may use him at this time.

Mr. Thompson: That is perfectly all right.

The Court: Proceed.

The Court. Proceed.

743 ARTHUR V. BROWN, called as a witness by Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Your name is Arthur V. Brown?

A. Correct.

Q. You are President of the Indiana National Bank?

A. Yes.

Q. And President of the Union Trust Company of Indianapolis?

A. Yes.

Q. And Vice President and Treasurer of the Indianapolis Gas Company?

A. That is right.

Q. And also associated with many other corporations in and around Indianapolis?

A. Yes, some of them.

Q. Do you recall, Mr. Brown, a telephone conversation of October 1, 1935 which you had in regard to some Indianapolis Gas matters with somebody in New York?

A. I do not, because I have a great many long distance calls every day. I don't remember.

744 Q. You don't recall anything about that conversation?

A. No.

Q. Who you talked with?

A. No.

Q. Or what was said during the conversation, or anything about it?

A. No, I do not.

Q. Do you recall whether you had any conversation with somebody in New York at the Chase Bank about the fact that the Indiana National Bank had wired \$168,575.00 to the Chase National Bank to pay the Indiana Gas coupons?

A. I don't recall.

Q. You do not remember anything about that?

A. No.

Cross-Examination by W. H. Thompson, Esq.

Q. Mr. Brown, you were present at the meeting of March 11, 1936 at the office of the Chase National Bank in the city of New York?

Mr. Burns: I object. It seems to me this is not cross-examination.

745 The Court: I do not know what it will lead to.

Go ahead. We won't have to call Mr. Brown back then.

Mr. Burns: May we understand this is part of the defense's testimony?

The Court: Proceed.

Q. I will ask you, Mr. Brown, if in that conference which has been testified to in some particulars by Mr. Beardslee, you did not tell Mr. Beardslee and Mr. Cole, the attorney for the Chase National Bank, that the City of Indianapolis had executed an agreement dated March 2, 1936 with the Indianapolis Gas Company?

A. I don't recall, no.

Q. Didn't you tell them the payment was to be made under the terms of the agreement of \$171,000.00 on the 25th day of March, 1936?

A. I don't know. I may. I can't remember.

Q. Do you remember that that was discussed at that meeting, Mr. Brown?

A. What?

Q. Don't you remember the question of the payment which was to be made by the City to the Indianapolis Gas Company was discussed at that meeting of March 11th?

A. I don't remember. I can't remember the facts.

Q. Do you remember anything that occurred at that meeting?

A. No.

Mr. Thompson: That is all.

The Court: That is all.

(Witness excused.)

747 PAUL C. BEARDSLEE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Cross-Examination by W. H. Thompson, Esq.

* * * * *

760 Q. At the meeting of March 11, 1936 Mr. Higgins or Mr. Brown or both of them told you, as you have already stated, that the City of Indianapolis had entered into an agreement with the Indianapolis Gas Company dated March 2, 1936?

A. Yes, they did tell us about that.

Q. And they told you that under the terms of that agreement the City of Indianapolis was to pay \$171,575.00 to the Indianapolis Gas Company, plus the Trustee's charges for disbursing the interest on the bonds, and that that payment was to be made on or before March 25, 1936?

A. I don't recall that at all.

Q. Didn't you discuss at that meeting, Mr. Beardslee, the question of whether the Indianapolis Gas Company ought to accept that money, and whether you, as Trustee, ought to accept it?

A. No, sir.

Q. Was it ever discussed later?

A. No, never was discussed as to whether we should accept it.

761 Q. They told you certain payments were to be made by the City under that agreement?

A. They told us generally of the terms of the agreement.

Q. Then you knew before there had been some delay

or trouble about these interest payments being made by the City of Indianapolis because you had sent a wire on October 1st?

A. You say "before". When do you mean?

Q. I mean before this agreement of March 2nd was executed.

A. Sure. If the funds were not in our hands a few days before the interest payment it is our practice to send out a wire.

Q. You had been told of the agreement of the City. Did you make any investigation or any inquiry then or later as to the sources of the money which you received in a letter from the Indianapolis Gas Company on March 28, 1936?

A. No, we didn't make any further inquiry. The check came.

Q. You knew it had been paid by the City under the terms of some sort of an agreement?

A. I didn't know what the agreement was.

Q. Didn't you have any curiosity about that agreement?

762 A. Those funds were paid to us merely as agents of a company.

The Court: As agent of what company?

The Witness: Of the Indianapolis Gas Company.

Mr. Burns: Not as Trustee of the mortgage.

Q. Not as Trustee of the mortgage?

A. No, I think it was merely an agency arrangement, the payment of those coupon funds.

Q. In other words you say, the coupons being payable at the office of the Chase National Bank when the Indianapolis Gas Company forwarded this money here, you were simply acting as an agent? You did not try to close your eyes to this transaction, did you, Mr. Beardslee?

A. We did not close our eyes, no.

Q. Did not the Chase National Bank, laying aside its banking connections now, but as Trustee under the mortgage, have a vital interest in knowing what was going on in this picture?

A. Yes, I would say that we did have an interest.

Q. When was the first time you knew the City had denied the validity of this lease?

763 A. I think it was November—the first time we really knew it was about November, 1935.

Q. You had written a letter in September in which it

was stated someone had directed your attention to the fact the City had abrogated the lease?

A. Yes.

Q. Did you investigate that?

A. We asked the City to send us a copy of their reply.

Q. Do you read the Wall Street Journal?

A. No.

Q. Do you pay any attention to the market prices of the bonds under the mortgages of which your Company is Trustee?

A. No, sir.

Q. Does anyone in the Chase Bank have any more intimate or direct contact with this matter than you?

A. Not that I know of. We don't follow the prices of bonds.

Q. Don't you follow the general financial news of the country to know what is going on?

A. I read the daily newspapers, the New York papers. I never read the Wall Street Journal.

Q. You knew late in September, 1935 someone had 764 advised you that the City had denied the validity of this lease. The language used in the letter that you wrote is "abrogated the lease."

A. Didn't I say it was newspaper reports?

Q. Had you seen newspaper reports before then?

A. Yes, I think I had seen a newspaper report, but it was nothing constructive about a newspaper report—I mean you couldn't—if we get an inkling from a newspaper report, naturally we would verify it with our principal, and that is the reason that letter of September, I think 19th, 1935, was written.

Q. Your first position as Trustee for this mortgage was you would not bring this suit unless you were indemnified?

A. That is correct.

Q. And then later when you submitted the question to the Baker firm as to whether the expenses of maintaining this litigation would be a charge ahead of the mortgage debt on the mortgaged property, you agreed to bring the suit without indemnification. Is that correct?

A. That is correct.

Q. And you were not indemnified by anyone?

A. That is true.

765 Q. Who has paid the costs of this litigation, if you know?

A. Well, I guess that Chase Bank has paid the costs so far.

Q. Do you know whether that is true or not?

A. I know we have paid some costs of this litigation.

Mr. Burns: The Citizens Gas and Coke Utility paid a substantial amount of it.

Mr. Thompson: Yes, we gave a check for \$450.00 for costs on appeal, if that is what you refer to.

The Court: That was after the reversal?

Mr. Thompson: That was after the reversal, and I might say we were not allowed much more than a day's time in which to do it.

Q. The insurance companies were present at this meeting of March 11th, were they not?

A. Yes.

Q. Mr. Rowe, representing the Massachusetts Mutual?

A. Yes.

Q. And Mr. Kugler, representing the New England Mutual?

A. That is correct.

Q. Did they say anything about your taking the 766 sum of \$171,575.00 from the Indianapolis Gas Company that was to be paid under this agreement of March 2nd?

A. Not to my knowledge.

Q. Did they make any objection to it?

A. I don't have any recollection of that question being discussed, even.

Q. Did you make any objection—

A. (Interposing) No.

Q. (Continuing) —at that time to the Indianapolis Gas Company going ahead and performing that agreement?

A. The agreement was already made at that time.

Q. I know, but it had not been executed yet, had it?

A. Wait a minute.

Q. It had not been performed or carried out?

A. Yes.

Q. The writing had been executed, but you did not make any objection to the City of Indianapolis or to the Indianapolis Gas Company about the City proceeding with paying money under the terms of that agreement? Never have you made any?

A. No. We were just protecting the rights of our Bondholders.

767 Q. You saw nothing inimical to your Bondholders in taking that money?

A. No, I think it belonged to the Bondholders.

Q. You saw nothing inimical to the rights of the Bondholders in making deposits in escrow—

Mr. Burns: I object to the question, as a matter of opinion.

Q. You saw nothing inimical to the interests of the Bondholders in the City paying this money into escrow so if the Trustee won the suit the Bondholders would get the money?

A. No, I don't see anything wrong with that.

Q. You thought that was a good thing for the Bondholders?

A. I didn't say that.

Q. But you saw nothing wrong in it?

A. Saw nothing wrong in it.

Q. You were very much interested as to whether these payments were being regularly and promptly made by the City of Indianapolis?

A. After we heard of its execution, yes.

Q. And wrote each time a payment was due,—you wrote either to the Indianapolis Gas Company or to the Indiana National Bank inquiring whether in fact the payment had been made?

A. That is true.

Q. You never expressed any dissent to the City?

A. Only by bringing the bill of complaint.

Q. Of course. Aside from that?

A. That is all.

The Court: When was this complaint filed?

The Witness: In June, 1936.

Mr. Thompson: June 6, 1936.

Q. You never learned extensions had been made by the City of Indianapolis to the distributing system of the Indianapolis Gas Company?

A. I never knew anything about that until I testified yesterday, I think it was.

Q. Are you also the registrar of this bond issue as well as the Trustee?

A. Yes, I think we are.

Q. You never asked to certify any bonds on account of the additions and betterments so made?

769 A. Within the last year or so, do you mean?

Q. I am talking about those made by the City of Indianapolis at any time.

A. We have never certified any bonds on improvements made by the City I know of.

Q. You know, of course, those additions were made in

pursuance of letters exchanged between the Indianapolis Gas Company and the City of Indianapolis?

A. I have learned of it.

Q. You see nothing inimical to the Bondholders in the City having added \$95,000.00 to this property, do you?

Mr. Burns: I object to the question. It merely calls for an opinion.

The Court: Sustained.

Mr. Thompson: That is all.

Redirect Examination by Mr. Burns.

Q. Mr. Beardslee, Mr. Thompson called your attention to interrogatory No. 2 which was propounded to you, which reads: "At whose request did you bring this action?"

Please answer fully the names of each person or corporation who requested this action be commenced, whether Bondholders of the Indianapolis Gas Company or others." At whose request did you bring this action?

A. The Bondholders.

Q. The New England Mutual?

A. And the Massachusetts Mutual Life Insurance Company.

Q. And those were the people at whose request you brought the action?

A. Yes.

Q. When Mr. Higgins asked you whether you would bring the action, what did you tell him?

A. We told him that if the Bondholders asked us to do it, we would. That was the final answer.

Q. Would you have brought the action at the request of the Indianapolis Gas Company if the Bondholders had not requested you to bring it?

A. Certainly not.

Q. You have stated that Mr. Higgins, when he came to New York on the 10th of April, did not bring with him any bill of complaint which was referred to in his previous letter of April 4th, is that right?

A. That is true.

771 Q. Did you ever see any bill of complaint or draft of bill of complaint or any provisions for a bill of complaint prepared by Mr. Higgins?

A. No, I never saw such a document.

Q. Mr. Thompson asked you whether the Trustee has certified any additional bonds for additions and better-

ments made by the City during the period since September 9, 1935, and you said it had not. Is that true?

A. That is true.

Q. As a matter of fact, the Trustee has not certified and additional bonds for additions and betterments since 1932, has it?

A. Somewhere along there; I do not know the exact time.

780 The Court: Do you have much more evidence?

Mr. Burns: Very little.

In connection with the Exhibits 58, 59, 67 and 76, which were introduced yesterday, they were not signed copies and it has been agreed by counsel that the signatures may be supplied.

The Court: All right.

Mr. Burns: I take it the Court doesn't care to have these depositions read?

The Court: No, not at this time.

Mr. Burns: We offer in evidence the direct examination and the exhibits identified in connection therewith, in the deposition of Robert E. Simond, which has been previously filed in this case, and ask to have the—

The Court: Was he one of the parties?

Mr. Burns: No, he is the manager of the Municipal Bond Department of Halsey Stuart & Company.

(Continued.) —and ask to have this marked—does your Honor wish to have the deposition marked with an exhibit number?

The Court: I think it had better be marked, per-
781 haps. Do you have several depositions?

Mr. Burns: There is just one here.

Mr. Thompson: Your Honor, we have filed a motion to suppress this deposition as well as the depositions taken in New York. I assume that your Honor will dispose of the questions arising on this motion to suppress—

The Court: That is right.

Mr. Thompson: (Continued.) —at some later time?

The Court: Yes, and you may show the offer at this time to read the entire deposition, or is this the cross-examination?

Mr. Thompson: He only offered the direct.

The Court: You are not asking that the cross-examination be read?

Mr. Thompson: I will when it comes to my turn.

The Court: All right.

Mr. Burns: We offer the direct examination and the exhibits attached thereto in Mr. Simond's deposition as PLAINTIFFS' EXHIBIT 133.

We offer in evidence, as PLAINTIFFS' EXHIBIT 134, the direct examination and the exhibits attached there-
782 to in the depositions of Chester M. Clark and Joseph Edwards Baker, taken in New York.

We offer as PLAINTIFFS' EXHIBIT 135 the brief of the City of Indianapolis and certain other defendants, in the Supreme Court of Indiana, in the case of Allen G. Williams against Citizens Gas Company of Indianapolis, et al.

Mr. Thompson: To which the defendant City objects on the ground that no admission which is signed by a lawyer can bind his client in litigation other than that in which the admission is made, and no statements in this brief can foist a lease on the City of Indianapolis.

The Court: What is the purpose?

Mr. Burns: Well, if the Court please, this is generally in connection with the other evidence that is introduced by the stipulation in the Williams case, to show what issues were presented and decided by the Court in that case.

The Court: Well, haven't you offered the pleadings in the case?

Mr. Burns: Yes.

783 The Court: Well, they would show the Court what the issues were, would they not? I doubt whether a brief of a lawyer, representing a party, is competent.

Mr. Burns: Well, it seems to me it is clearly competent.

The Court: I will take that up later on when we come to pass on all of these exhibits that you have offered.

Mr. Burns: Well, now, if the Court please, in connection with the rulings that have been reserved on the admission of various exhibits offered by the plaintiff, may we have the understanding that, to the extent that any of those exhibits are excluded, they may appear in the record as offers to prove?

The Court: I want to do this either at the conclusion of the plaintiffs' case or all of the entire case; then take up each exhibit and see which ones are read and the ones that are not, and take the objections up and pass upon them at that time. It might be well to do that at the conclusion of all of the evidence unless there is some-

784 thing that would come up in the plaintiffs' case which would raise a question. That is, we can begin at the first of these exhibits that are offered, and I will pass on them all at once.

Mr. Burns: It has been called to my attention that we failed yesterday to offer the minutes of The Indianapolis Gas Company of May 12, 1936, Exhibits 123-A, 123-B and 123-C, and we now offer those minutes.

The Court: Those are the minutes that have the copies of the letters?

Mr. Burns: Yes.

The Court: Is there any objection?

Mr. Thompson: None whatever.

The Court: Let them be read.

The said pages of minutes, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 123-A, 123-B AND 123-C, were admitted and read in evidence.

Mr. Burns: I would like to call Mr. Yule back.

The Court: Come around, Mr. Yule.

785 WILLIAM J. YULE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Mr. Burns: Now, without encumbering the record, I want to ask Mr. Yule again about the telephone conversation of which he overheard Mr. Brown's end of the conversation, here. As I understand it, that has been brought out with some idea of charging the Chase Bank with knowledge and it seems to me Mr. Yule can testify as to what he heard as limiting what possible knowledge could have come to the Chase Bank through that conversation.

Now, I think, as your Honor said, it is clearly hearsay that Mr. Brown was talking to the Chase Bank because Mr. Yule doesn't know that and if—

The Court: There is no evidence as to whom he was talking. Did he talk to Mr. Beardslee?

Mr. Burns: Oh, no, no, no. Mr. Yule said, I think in response to Mr. Higgins' question, that he called up somebody at the Chase Bank.

The Court: I don't think it would be competent. Mr. Brown was on the stand and he remembered nothing about it.

786 Mr. Burns: I thought, if it is relied upon as giving any knowledge to the Chase Bank, it seems to me—

The Court: Well, of course, it would not be notice unless there is some evidence of what took place. There is no evidence of that at all.

Mr. Burns: That is all, Mr. Yule.

Witness excused.

The Court: If the defendant offers any evidence as to that conversation, then perhaps, in rebuttal, it might be competent to call this witness to show what he heard, but in the absence of it, I would say that the mere fact that a telephone conversation took place and no evidence of what the contents of the conversation—

Offer to Prove.

Mr. Burns: Well, we offer to prove by Mr. Yule that the only information which Mr. Brown conveyed over the phone was that a check had been wired or money 787 had been wired by The Indiana National Bank to the Chase Bank to pay the coupons, and he waited on the phone to see whether the Chase Bank had received the check, and that there was no conversation, and nothing that Mr. Brown said, that related either to the dispute between The Indianapolis Gas Company and the City about the lease or to the circumstances under which the money had been paid to the Indianapolis Gas.

The Court: That is your offer?

Mr. Burns: That is our offer.

The plaintiff rests both cases.

And the plaintiffs here rested.

790

Indianapolis, Indiana,
Friday, March 3, 1939,
One-thirty O'clock P. M.

The Court met pursuant to adjournment and the trial of the cause was resumed as follows:

Whereupon, the defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Board of Directors for Utilities of the City of Indianapolis, to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

Mr. Thompson: Is it your Honor's desire that before we proceed with the introduction of the testimony on be-

half of the City that I should state my objections to these exhibits?

791 The Court: I should rather take them up separately, and then make a separate objection, or groups, and I will pass on them then.

Mr. Thompson: You would rather do that at the conclusion of the case?

The Court: I think I would rather, if there is no objection. If it becomes necessary to pass upon any one before the conclusion of it, why, we will take it up.

WILLIAM J. YULE, a witness being recalled on behalf of the City of Indianapolis and certain individual defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. You have testified before in this case?

A. Yes, sir.

Q. And are Secretary of The Indianapolis Gas Company?

A. Yes, sir.

Q. I hand you an instrument which has been identified as City's Exhibit No. 9, rejection of an assignment of lease, and I will ask you to state to the Court whether that instrument, or a copy of it, was served
792 on The Indianapolis Gas Company on September 9, 1935.

A. Well, I think so.

Q. It was handed to you personally, was it not, by Mr. Rabb?

A. Yes.

Mr. Thompson: That is all.

The Defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of the City of Indianapolis, offer in evidence an instrument identified as City's Exhibit No. 1, which is a certificate by John M. Layton, Clerk of the City of Indianapolis, authenticated by the Judge of the Circuit Court.

The Court: Is that the exhibit you just had?

Mr. Thompson: No, your Honor.

Mr. Burns: What is the exhibit number?

Mr. Thompson: No. 1.

The Court: Any objection?

Mr. Burns: Yes, we object to it. It is wholly irrelevant and immaterial and not binding in any way on 793 the Trustee or the bondholders.

The Court: What is the substance of the certificate?

(Mr. Thompson here read City's Exhibit No. 1.)

Mr. Burns: I object on the further ground that the certificate contains many conclusions as to the effect of supposed legislation and so forth, and is not a certificate of fact.

Mr. Higgins: The Indianapolis Gas Company also objects to the admission of this evidence on the same grounds as already stated.

The Court: Objection overruled.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 1, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence Exhibit No. 2, which is a similar certificate by Martin H. Walpole, Executive Secretary and Clerk of the Department of Public Works of the City of Indianapolis, and showing that no such action has been taken by the Board of Public Works.

794 The Court: The same objection?

Mr. Burns: The same objection.

The Court: Shew the same ruling and read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 2, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit No. 3, which is a certificate from Charles S. Rauh, Secretary of the Board of Trustees, to the same effect.

(Mr. Thompson here read City's Exhibit No. 3.)

The Court: These statements as to the sale of bonds or securities were made before the taking of the property owner. Are there exhibits in evidence of any action of the City?

Mr. Thompson: There is a deposition that has not been read to your Honor.

The Court: That was after?

Mr. Thompson: That was after the sale of the Utility District bonds, before the resale of them and before 795 the City had taken the property.

The Court: I see. Let that be read in evidence, with the same objection.

Mr. Elam: We object further that the evidence already admitted shows the certificate is not true. The evidence before your Honor shows that the Department did authorize the sale of revenue bonds and that the City did authorize advertisements, and those advertisements constituted the representations.

The man is merely certifying to his conclusion as to what the written instruments mean that are before the Court, and for the Court to interpret, and it is not for the Secretary to say what the instruments mean.

The Court: All right, let it be read.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 3, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit 4, which is a similar signed certificate from

Roy Sahn, Secretary of the Board of Directors for 796 the Utilities Department.

The Court: The same objection and ruling. Let the record show that both The Indianapolis Gas Company and the plaintiffs make the same objection.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 4, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit No. 6-A, which is a copy of the interrogatories propounded by the defendant, City of Indianapolis, and the individual defendants, to the plaintiff.

The Court: And the answers?

Mr. Thompson: The interrogatories only.

The Court: Any objection to these?

Mr. Higgins: Interrogatories of what?

Mr. Thompson: Interrogatories of the plaintiff in No. 1844.

The Court: Were these the interrogatories to which the objection was overruled just a few weeks ago?

Mr. Thompson: Yes, your Honor.

797 The said document, so offered, marked for identification CITY'S EXHIBIT NO. 6-A, was admitted and read in evidence.

Mr. Thompson: Now, I am going to offer 6-B, the answers. The same defendants offer as City's Exhibit No. 6-B all of the answers to the interrogatories identified as Exhibit 6-A, which have not already been introduced in evidence by the plaintiffs. I say that, your Honor, because certain of these letters have already gone in.

The Court: I am not certain. The ruling has been withheld on some of them; for instance, 12.

Mr. Burns: They substantially amount to a duplication between the letters shown in the answers to interrogatories propounded to the plaintiff and the answers on those propounded to the Indianapolis Gas; but there are some letters—

The Court: I say there should be no duplication. Let 6-A and 6-B be read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT 6-B, was admitted and read in evidence.

798 Mr. Thompson: Now, as 5-A, the same defendants offer in evidence the interrogatories propounded to The Indianapolis Gas Company and also Exhibit 5-B, the answers of The Indianapolis Gas Company to the interrogatories, except I do not offer any portion of the answers which have already been offered in evidence.

The Court: Any objection?

Mr. Higgins: Not at all.

The Court: Let them be read.

The said documents, so offered, respectively marked for identification CITY'S EXHIBITS 5-A and 5-B, were admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence the minutes of a special meeting of the Board of Directors of The Indianapolis Gas Company held at Indianapolis, Indiana, on September 26, 1935, identified as City's Exhibit 7-A.

The Court: Any objection, Mr. Higgins?

799 Mr. Higgins: May I see that just a second?

Mr. Thompson: I have a copy of this I am offering that I can give Mr. Burns.

Mr. Burns: We have no objection to these minutes to show the action was taken by the Board of Directors for the Utilities, but we do object to them as being any evidence of the facts recited therein.

Mr. Thompson: This is The Indianapolis Gas Company.

Mr. Burns: It doesn't make any difference.

Mr. Higgins: Objected to as legal conclusions therein set out.

The Court: Of course, I think it is competent, as I stated yesterday, I believe it was, with reference to this contract, upon the theory that the defendant was paying under this contract and under the lease. That is compe-

tent for that purpose. Just the effect, I don't know, but I think it is only fair to show why the City is making those payments.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-A, was admitted and read in evidence.

800 Mr. Thompson: The same defendants offer in evidence City's Exhibit 7-B, being a photostatic copy of the minutes of an adjourned meeting of the Board of Directors of The Indianapolis Gas Company held in Indianapolis, Indiana on September 30, 1935.

The Court: Any objection?

Mr. Higgins: No objection.

The Court: Let that be read.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-B, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence—

Mr. Burns: I make the same objection, that we object to the minutes insofar as they are offered to prove any facts recited in them. I make no objection as to what action took place at the directors' meeting of the company.

Mr. Higgins: We understand that they are being admitted on that phase.

Mr. Thompson: I am offering it generally for
801 whatever it proves.

Mr. Burns: Do I understand the Court overruled my objection?

The Court: I have not passed on this one.

Mr. Burns: That is incompetent to prove the facts recited.

The Court: I am admitting it for whatever it is worth. As I say, the action by The Indianapolis Gas Company and the City certainly is evidence tending to show why the City made those payments. Before this, as I understand the record, the City had already served notice that it would not be bound by the lease; then, of course, this evidence will show—be competent to show why.

Mr. Burns: What I have in mind is this: in almost all resolutions there are a lot of whereas clauses which set forth a lot of reasonings why the action is taken, and this recitation seems to me clearly is not competent evidence of the facts stated in there.

The Court: I am not prepared to say on that.

Mr. Burns: We want to have our objection to each of

these exhibits insofar as they are offered, for that purpose.

The Court: Let the record show the objection overruled.

Mr. Thompson: The same defendants offer in evidence, as City's Exhibit 7-C, a photostatic copy of the minutes of the special meeting of the Board of Directors of The Indianapolis Gas Company held in Indianapolis, Indiana on November 6, 1935.

The Court: What are the contents of those?

Mr. Thompson: They contain a number of things. They contain correspondence between the City of Indianapolis and The Indianapolis Gas Company, and also the minutes which contain the authorization for the employment of the Baker firm, the exchange of correspondence between the Baker firm and The Indianapolis Gas Company. I am not sure, it may be that letter has already been introduced by Mr. Burns. If it has, I shall not offer it now.

The Court: Any objection?

Mr. Burns: We make the same objection.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-C, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence the City's Exhibit 7-D, a photostatic copy of the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company, held in Indianapolis, Indiana on March 4, 1936.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-D, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence, as City's Exhibit 7-E, a photostatic copy of the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company, held in Indianapolis, Indiana on April 3, 1936.

And the next one is 7-F, which is minutes of a meeting of the Board of Directors of The Indianapolis Gas Company of May 12, '36, but I am not offering that because an offer of the same minutes has already been made by Mr. Burns.

The Court: What are those exhibits?

Mr. Burns: 123-A, B and C.

804 The Court: If the record does not show those exhibits are read in evidence, let it be shown at this time, 123-A, B and C.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-E, was admitted in evidence.

Mr. Thompson: The same defendants now offer in evidence City Exhibit 7-G, the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company held on June 3rd, 1936.

The Court: Any objections?

Mr. Higgins: Show all those same—

Mr. Thompson: Yes.

Mr. Burns: We object to that on the same ground; and I should like to state this general objection to all these exhibits, and that is that any action taken by The Indianapolis Gas Company or by the City of Indianapolis could in no way affect or prejudice the rights of the bondholders and Trustee. This is the same question we raised before, and we want all these minutes of The Indianapolis

Gas Company to be received subject to that same objection.

The Court: The last may be read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT 7-G, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit No. 8, which is a general ordinance of the City of Indianapolis, being No. 82, for the year 1935, and the substance of which is a ratification by the City of Indianapolis, through its Common Council, of the action taken by the Board of Directors for the Utilities of the City of Indianapolis, in taking over the property of the Citizens Gas Company, and in rejecting the assignment of The Indianapolis Gas Company lease.

Mr. Burns: We object to that as not binding on the Trustee or the bondholders; could not affect the obligations of the City after the City had accepted the property subject to all obligations of the Citizens Gas Company.

Mr. Higgins: And The Indianapolis Gas Company 806 also objects.

Mr. Ewbank: What is the date of this ordinance?

Mr. Thompson: October 21, 1935.

Mr. Burns: The same objection.

Mr. Higgins: The same objection. It cannot affect the rights of The Indianapolis Gas Company.

The Court: Objection overruled.

The said document, so offered, marked for identification

CITY'S EXHIBIT NO. 8, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit No. 9, which is a rejection of the assignment of the lease and refusal to assume, executed on the 9th day of September, 1935, signed by the Board of Directors of the Utilities for the City of Indianapolis, by H. L. Dithmer, its President.

The Court: The same objection?

Mr. Burns: The same objection. Any resolution of rejection could not possibly affect the bondholders or Trustee.

807 The Court: Of course, that is true if it is a valid lease, but I think it is competent to show what action was taken, so the Court will have all before it. Objection overruled.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 9, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit 10, which is twelve sheets, being photostatic copies of the record of the Utility District of the City of Indianapolis, showing entries made in connection with payments and the amounts, quarterly, of the bond interest and stock interest, Federal taxes and other items.

The Court: Is that the same that was offered yesterday?

Mr. Burns: We object to this as a purely self-serving declaration: simply entries made in the Utility District records, showing how it charged the items that have been paid to The Indianapolis Gas Company, or put in
808 escrow, being purely a self-serving declaration.

The Court: Are those the same amounts stipulated yesterday that were paid?

Mr. Thompson: Yes, your Honor.

Mr. Burns: These include all charges for all money that has been put in escrow?

Mr. Thompson: Yes, but they begin here, December 31, '35, an amount equal to the stock interest. The purpose of this, your Honor, is to show the kind of entries made in our books at the time those payments were made.

The Court: Has it been stipulated—I have not read the stipulation at all—the amount that has been placed in escrow and the times that it was placed, and the amount there at this time? Is that in your stipulation?

Mr. Burns: The stipulation covers what has been paid to escrow. This is simply a self-serving declaration showing what they put on their books.

The Court: I am not exactly certain that is competent.

It simply goes to confirm the position of the City 809 that it acted in accordance with its understanding of the agreement made back in September, 1935. I think that would be all the purpose it would serve.

Mr. Thompson: That is the purpose of our offering it. We show we did enter into certain agreements between The Indianapolis Gas Company and the City of Indianapolis in respect to certain payments to be made for the use and occupancy of this property. Now it is our claim that all of these payments were made in accordance with the agreement; and we are offering to show the entries that were made on our books currently, which show our interpretation of that agreement; and it seems to me—

The Court: Any objection on the part of The Indianapolis Gas Company?

Mr. Higgins: Purely as a self-serving declaration, whatever they put on their books. It is already stipulated when they paid the amounts.

The Court: The contracts are in evidence?

Mr. Higgins: They are all in evidence.

The Court: This is in the nature of a self-serving declaration, yet it might go to further carry out the position of the City as to how it understood the agreement. I don't think it will hurt anyone. Let it go in for that purpose and that only.

The said documents, so offered, collectively marked for identification CITY'S EXHIBIT NO. 10, were admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence an instrument identified as City's Exhibit No. 11, which is a transcript of the Department of Public Utilities of Indianapolis, Indiana in connection with the issuance and sale of eight million dollars of Utility District revenue bonds. These contain the resolutions authorizing them, the advertising and the entire transaction.

The Court: That was made at the time of taking over the property or just prior thereto?

Mr. Thompson: Prior to it, your Honor. The bids were opened on May 28 and the bid was awarded to Halsey Stuart Company and Otis Company on the 29th of May, and the property was not taken over until September 9th following.

811 The Court: That was for the purpose of raising money to take the property over?

Mr. Thompson: That is right.

Mr. Ewbank: I didn't get what that was.

Mr. Thompson: It is a transcript of all the proceedings had by the City of Indianapolis, through its Department of Utilities, in connection with offering for sale and the sale of the eight million dollars of Indianapolis Utility District revenue bonds.

The Court: Any objection?

Mr. Burns: I should like to have the record show, in connection with this exhibit, we do not object to it except as it may be offered as evidence of—independent evidence of facts recited therein; but we should like to have the record show that this is an exact copy of Exhibit 6, which was identified but not offered, in connection with the deposition of Mr. Simond, in Chicago; and Mr. Thompson agreed there to save the trouble—all counsel for defendants agreed there, to save the trouble of making a copy to attach to the deposition, that we would produce it here.

May I see it?

812 Mr. Thompson: Certainly.

Mr. Burns: And that it could be—

The Court: It is not necessary to be read in connection with the deposition.

Mr. Burns: It is agreeable to have it show this is an accurate copy of the same document?

Mr. Thompson: Yes, sir.

The Court: Let the exhibit be read.

Mr. Burns: Mr. Rabb says it is a duplicate original.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 11, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence, as City's Exhibit No. 12, Pages 178 to 236, both inclusive, of the minute book of the Board of Directors for the Utilities of the City of Indianapolis, in which there is set forth the minutes of a meeting of that Board on September 9, 1935, the day when the City took over the property of the Citizens Gas Company.

The Court: Have you had opportunity to examine it?

813 Mr. Burns: I have had opportunity, generally, to go through those minute books at various times. We object to it, first, insofar as it is offered as any evidence of the facts recited therein.

The Court: I think you can have that objection to all of these, as far as the Court is concerned. Of course, we have to determine what the legal effect is.

Mr. Burns: We would also object insofar as it is offered to establish the so-called rejection of the lease. We believe the evidence shows the lease was accepted and the property was accepted.

Mr. Higgins: We have not had opportunity to examine it. May we have that right?

The Court: I will reserve the ruling on this last exhibit, and he can examine it.

Mr. Thompson: The same defendants offer in evidence a letter dated September 10, 1935, identified as City's Exhibit No. 13, from the firm of Smith, Hornbrook, Remster & Smith to Thompson, Rabb & Stevenson, acknowledging the physical delivery of the resolution for the 814 rejection of the assignment of the lease.

The Court: Any objection?

Mr. Burns: Only the same objection we have to the whole proceeding, so far as this rejection is incompetent. We have no particular objection to this exhibit. Perhaps it would save time if we objected to this whole line of evidence, so far as it relates to the rejection of the lease, rather than make an objection to every separate document.

(CITY'S EXHIBIT NO. 13 admitted and read.)

STIPULATION.

Mr. Thompson: Will it be agreed that, at the time Exhibit No. 13 was written on September 10, 1935, Mr. Henry H. Hornbrook was a member of the firm of Smith, Remster, Hornbrook & Smith, which signed this letter, and that at that time he was attorney for the Citizens Gas Company and a member of its Board of Directors and of the Executive Committee?

Mr. Burns: We will so agree.

The Court: Let the record show that that is stipulated.

Mr. Thompson: Your Honor, there has been offered in evidence here, as Plaintiffs' Exhibit No. 1, certain portions of a stipulation, signed by counsel for all of the parties to this cause.

The defendants, City of Indianapolis and the individual defendants who are members of its Board of Direc-

tors and Board of Trustees for Utilities, now offer in evidence all the remaining portions of the stipulation, identified as Exhibit No. 1, which were not offered by the plaintiffs, and all of the exhibits, attached to that stipulation, which have not already been offered.

The Court: I would like to take that up at the time we take up the offers of the plaintiff, so that we can go through the stipulation and see what they are.

Mr. Burns: And take up the objections which we wish to make at that time?

The Court: That is right, and the objections which I understand Mr. Thompson wishes to make to the offer of some of the exhibits that were offered by the plaintiffs.

Mr. Thompson: Will you be sworn, Mr. Higgins?

816 WILLIAM R. HIGGINS, a witness called on behalf of the Defendant, City of Indianapolis, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name to the Court.

A. William R. Higgins.

Q. You reside in Indianapolis?

A. I do.

Q. You are, and for many years have been, a Director of The Indianapolis Gas Company?

A. For some years.

Q. How long does your service as a Director of that company go, Mr. Higgins?

A. Perhaps ten years—approximately.

Q. You have served continuously during that time?

817 A. Yes.

Q. Are you also an attorney and a member of the Bar of this Court?

A. Yes.

Q. Do you represent, together with Judge Ewbank, The Indianapolis Gas Company in this controversy?

A. I do.

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824 BRODEHURST ELSEY, a witness called on behalf of the Defendant, City of Indianapolis, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name.

A. Brodehurst Elsey.

Q. Where do you reside, Mr. Elsey?

A. 1335 Central Avenue, Indianapolis.

Q. What is your occupation?

A. Secretary-Treasurer of the Indianapolis Glove Company.

Q. How long have you been connected with the Indianapolis Glove Company?

A. Thirty-four years.

Q. Are you a member of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis?

825 A. Yes, sir.

Q. How long have you been connected with that Board?

A. Since 1931.

Q. Are you also Vice Chairman of the Board?

A. Yes, sir.

Q. Were you at one time Treasurer of the Board?

A. Yes, sir.

Q. For how long a period were you Treasurer?

A. From 1931 until the last election.

Q. That was sometime last year?

A. Yes, sir.

Q. Who is the Chairman of the Board and who is the Secretary?

A. Mr. Henry L. Dithmer is Chairman and Mr. Roy Sahm is Secretary.

Q. Have you given a substantial portion of your time and attention to the work of the Board of Directors and are you familiar with the action taken by it in the several matters involving the transfer to the City of Indianapolis of the property formerly owned by the Citizens Gas Company?

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A. Yes, sir.

826 Q. I have shown you, before you came into the court room, Mr. Elsey, an instrument identified as Exhibit "B", attached to the City's answer and counterclaim in this case, which is a circular issued by Otis & Company—no, Halsey Stuart & Company in connection with the resale of Utility District Bonds. You are familiar with that circular?

A. Yes, sir.

Q. I wish you would tell the Court whether or not the Board of Directors for Utilities of the Department of Utilities had anything whatever to do with the issuance or circulation of that circular.

A. No.

Mr. Burns: I object to that. It calls for a conclusion, very obviously.

The Court: Overruled.

Q. You say you had nothing to do with it?

A. No, sir.

Q. What instructions, if any, did you give to your attorneys in connection with the resale of bonds purchased by the City from Otis & Company and Halsey Stuart & Company?

827 A. We had no interest in the resale of the bonds.

Q. What is the fact as to whether you had a conversation in my office—

Mr. Thompson: Withdraw the question.

Q. These Utility District bonds were offered for sale May 28, 1935? Is that correct?

A. That is my recollection, yes.

Q. And the joint bid of Otis & Company and Halsey Stuart & Company was accepted on the next day?

A. Yes, sir.

Q. You know Mr. R. E. Simond, President of Halsey Stuart & Company?

A. I met him once.

Q. Yes, and you also met Mr. Cyrus Eaton of Otis & Company?

A. Yes, sir.

Q. Did you meet those two gentlemen in my office after the Utility District advertised the sale of its revenue bonds and before the bond offering was made with these two houses?

A. Yes, sir.

828 Q. Was I also present at that meeting?

A. Yes, sir.

Q. I wish you would state what, if anything, was said at that meeting in connection with the request, by these two bond houses, that the Utility District approve a circular which they proposed to issue.

A. We said that we would not approve it.

Q. Well, did they ask you to approve it?

A. Yes, sir.

Q. And you said—

The Court: I understand they were present at this conference.

The Witness: Yes, sir.

Q. And you said that the Utility District would not approve it and would not have anything to do with the resale of the revenue bonds?

A. That is what we told them.

Q. Did I say anything in that conversation in connection with the statutory authority of the City in that matter?

A. Will you ask that question again?

829 Q. I want to know whether, in that conversation, where you and Mr. Simond and Mr. Eaton were present in my office, I said anything as to whether the City of Indianapolis had any statutory right to approve this circular for the resale of the bonds.

A. You said it did not have.

The Court: As I understand, this circular was prepared by Halsey Stuart?

Mr. Thompson: That is right.

Mr. Burns: The deposition shows, if the Court please, that it was prepared by Halsey Stuart and approved by Thompson, Rabb & Stevenson and marked "Approved" by Mr. Rabb.

Mr. Thompson: I will tell you what it shows.

The Court: Well, I can go into it.

Mr. Thompson: Mr. Simond admits, in his deposition, on cross examination, the conversation that I have just related to Mr. Elsey, and admits that he forwarded this to our firm as attorneys and did not even address us as attorneys for the Utility District because I had told him that the City of Indianapolis would not approve the bond circular.

830 Now, that is what the deposition shows.

The Court: Does it have an approval of Mr. Rabb on it?

Mr. Thompson: There is written, in pencil, on a bond circular, the word "Approved, T. R. S."

The Court: "T. R. S."?

Mr. Thompson: "T. R. & S."—Thompson, Rabb & Stevenson—an abbreviation.

Mr. Burns: "By A. L. Rabb"?

Mr. Thompson: I think that is probably correct. I said that the initials were the initials of our firm.

Q. Did the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, at any time, formally or informally, authorize any representation or statement to be made by anyone in your behalf or that of the City in connection with the resale of such revenue bonds by Otis & Company or Halsey Stuart & Company?

A. No, sir.

Mr. Burns: I object, if the Court please. If the 831 inquiry is being made as to statements that were made by the Utility District, in connection with the offering of these bonds, to Otis & Company and Halsey Stuart & Company, certainly they were entitled to rely on those statements in marketing the bonds, statements that had been made to them, and, when they so made these statements,—the Utility District made these statements to the purchasers, without doubt, about the property and so forth that they were describing as a basis for the issuance of these bonds—they were necessarily making representations to those purchasers that those purchasers were authorized to use in the resale of the same bonds.

The Court: Well, there are so many exhibits that I don't know—

Mr. Burns: I appreciate that, but this question obviously calls for the witness's conclusion. It is about a large mass of material rather than any statement of fact, at all.

The Court: I think he may answer the question and it can be considered along with all the other evidence.

Go ahead.

832 Q. In connection with the resale of the Utility Revenue Bonds by Otis & Company and Halsey Stuart, I want to ask you specifically whether the Board made, or authorized anyone in its behalf to make, either formally or informally—I am speaking now of the authorization—anyone of the following representations to any person:

First: That upon the acquisition of the Citizens Gas Company property, the City of Indianapolis would con-

trol the gas business in Indianapolis, supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its suburbs;

Second: That the Citizens Gas Company held a lease for ninety-nine years, covering the property and business of The Indianapolis Gas Company, thereby giving it control of the entire gas business of the City of Indianapolis and vicinity;

Third: That the property, covered by said lease from The Indianapolis Gas Company, had a depreciated physical value of \$9,181,960 and a reproduction value of \$12,734,090 as against which the capital value of said company's outstanding first consolidated mortgage five per cent gold bonds was \$6,881,000 and the capital 833 value of its outstanding stock was \$2,000,000;

Fourth: That, upon the acquisition of the entire property operated by the Citizens Gas Company, the City of Indianapolis would cause the same to be continuously operated as a gas system in an efficient manner and at a reasonable cost and would use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County and in the towns therein?

A. No, sir.

Q. Did your Board—

Mr. Burns: I would like to make the same objection to that question.

The Court: All right. Same ruling.

Q. Did your board cause an appraisal to be made by an independent engineer, as of January 1, 1935, of the cost of reproduction new and the depreciated value of the property of the Citizens Gas and Indianapolis Gas, all as referred to in the circular issued by Otis & Company and Halsey Stuart & Company?

A. No, sir.

834 Mr. Burns: Same objection.

The Court: Do you have that circular? I haven't seen it.

Mr. Thompson: I can give it to your Honor.

Mr. Burns: I can give you a copy (handing copy to the Court).

Q. Do you remember, Mr. Elsey, that two opinions were given in respect of the Utility District bonds that were sold by the Utility District?

A. Yes, sir.

Q. One of those was given by the firm of Matson, Ross, McCord & Clifford?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And whom did that firm represent?

A. It represented Otis & Company.

Q. And another was given by our firm?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

835 The Court: By whom?

Mr. Thompson: By our firm.

Q. Representing the Utility District?

A. Yes, sir.

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837 Q. Mr. Elsey, will you state to the Court whether,
at any time, the Board of Directors for Utilities of the
Department of Utilities of the City of Indianapolis
838 authorized your counsel, Thompson, Rabb & Steven-
son, in connection with the sale of Utility Revenue
Bonds, the sale of which you have referred to, to give
any opinion on the non-taxability of the income of those
bonds for Federal income tax purposes?

Mr. Burns: I object, if the Court please. It asks, obviously, for a conclusion of law as to what authority was given.

The Court: Overruled.

A. We felt—

The Court: Just answer the question.

A. No, we never authorized it.

Q. Mr. Elsey, was your attention and that of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis directed to a mortgage, which had been executed by the Citizens Gas Company on July 1, 1912, under which there were outstanding, on September 9, 1935, \$2,745,000 par value of first mortgage bonds, issued by the Citizens Gas Company?

A. Yes, sir.

839 Q. Was the attention of your Board also directed to the provisions of Subdivision 22(i) of the franchise contract between the City of Indianapolis and Alfred F. Potts, et al., subsequently assigned to the Citizens Gas Company, which reads as follows:

“If the plant and system of mains of said company shall not have become the property of said city by the

cancellation of the certificate of subscribers and conveyance of such property to such city by the Board of Directors and Trustees of said Company on or before the expiration of the aforesaid period of said franchise, then said city by and through its Board of Public Works, upon the expiration of said franchise period shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated or owned and leased by it; or at the option of said city the Board of Directors of the corporate successor of the second parties shall, as heretofore provided, upon the conclusion of said franchise period, mortgage its plant and with the proceeds thereof or with 840 the mortgage notes issued in proper amounts pay off and discharge the amount due certificate holders and thereupon convey said plant to said city subject to such obligation and other legal obligations against said company."

I am asking you whether the Board's attention was directed to that.

A. It was.

Q. And did you seek the advice of your counsel as to whether the mortgage, executed by the Citizens Gas Company on July 1, 1912, to which I have referred, on which there were outstanding these bonds, was a valid mortgage or otherwise?

A. You said it was not—

Q. Yes.

A. (Continued)—but the holders of the mortgage had an equitable interest in the property.

Q. An equitable lien on the property?

A. An equitable lien because the money had been used for the benefit of the Citizens Gas Company.

Q. Now, the Board of Directors furnished the money—they issued the advertisement that is contained in 841 this stipulation? You have seen that advertisement about taking up these bonds?

A. Yes.

Q. Now, I want you to tell the Court whether the Board of Directors, in making the payment of these bonds or, rather, in paying the amount of the bonds, acted in pursuance of the advice of your counsel and whether, without that advice, you would have made that payment?

A. We acted on our counsel's advice.

Q. Well, without that advice, would you have made that payment?

A. We would not have done it.

Q. As a practical matter, did the existence of this mortgage prevent the Citizens Gas Company from executing a mortgage upon its property to secure the money with which to pay off the precedent charges provided for in the franchise contract?

A. Our Board deemed it so.

Q. Yes. Now, following the receipt of this advice, to which I have just referred or you have just referred to, did the Board of Directors adopt a resolution, Exhibit 842 48 to the Stipulation in this case, and publish two notices, Exhibits 49 and 50 to the stipulation? I showed you those in my office.

A. Yes, sir.

Q. I will ask you to state to the Court whether the Board of Directors for Utilities of the Department of Utilities of the City, at any time, recognized this mortgage as a valid obligation.

Mr. Burns: Oh, I object.

The Court: Objection sustained.

Mr. Thompson: Will you give me the Stipulation, please, Mr. Rabb? (Procuring Stipulation from Mr. Rabb.)

Q. I want to call your attention next, Mr. Elsey, to Subdivision 16 (a):

"The City caused the sum of \$2,500,000 to be paid on or about July 1, 1935 for the retirement of all the Citizens Gas common stock, in full satisfaction of the common stockholders' interest in the property and assets of said company. Said \$2,500,000 included \$2,000,000 as the par value of said common stock and \$500,000 as dividends 843 on said common stock at the rate of 10% per annum from January 1, 1933 to June 30, 1935. The City also caused the sum of \$1,050,000 to be paid on or about September 1, 1935, for the redemption of all the Citizens Gas preferred stock, in full satisfaction of the preferred stockholders' interest in the property and assets of said company. Said \$1,050,000 included \$1,000,000 as the par value of said preferred stock and \$50,000 as the premium of 5% on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed."

Now, I ask you, Mr. Elsey, whether, before the payments were made by the City of Indianapolis in accordance with the statements contained in Subdivision 16(a) of this Stipulation, your Board sought an opinion from your counsel as to whether your Board was legally bound to make those payments.

A. They did.

Mr. Burns: I object to that as wholly immaterial to any issue in this case.

844 The Court: Overruled. It goes to the fact of why those payments were made.

A. They did.

848 Q. You had taken advice from us?

A. Yes, sir.

Q. Was that advice oral or in writing?

A. I think it was oral.

Q. But what was the nature? What was the character of that advice? What was told you?

A. Well, we were to take over the property and we couldn't secure moneys to carry on the program without we discharge the obligations as provided for in the original covenant.

Q. Weren't you advised, in addition, Mr. Elsey, that it had been decided, in the Todd case, that, before the City of Indianapolis could take this property over, it had to discharge the precedent obligations to its stockholders?

A. Yes, sir.

Q. The stockholders of the Citizens Gas Company?

A. Yes, sir.

849 Q. Evidence has been introduced in this case of certain payments made or authorized to be made by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis to or on behalf of The Indianapolis Gas Company subsequent to September 9, 1935, and, in this connection, I ask you whether you are familiar with a resolution for the temporary use of property of The Indianapolis Gas Company, adopted September 9, 1935, by the Board of Directors for Utilities, which has been introduced in evidence here, and also certain correspondence exchanged between The Indianapolis Gas Company and your attorneys in connection with the payments so made?

A. Yes, sir.

Q. You may state whether the Board of Directors for

Utilities of the Department of Utilities would have authorized any such payments to be made except for the adoption of such resolution and the exchange of such correspondence?

A. They would not.

Q. Has the Board of Directors ever made—and 850 by that I mean the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis—ever made or authorized to be made, any payments on account of interest or dividends or for any other purpose under the terms of said lease of September 30, 1913?

A. No, sir.

Q. Has the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis ever recognized in any way, formally or informally, the validity of said lease of September 30, 1913, between the Citizens Gas Company and The Indianapolis Gas Company or its enforceability against the City of Indianapolis?

Mr. Burns: I object.

A. No, sir.

Mr. Burns: It calls for a conclusion.

The Court: Let the answer go out. Objection sustained.

Q. Before the transfer to the City, as Successor 851 Trustee, did the Board give any instructions to its attorneys in connection with said lease of September 30, 1913?

First, I ask you whether you gave any instructions.

A. Yes.

Q. What instructions did you give?

Mr. Burns: I object to that as not binding on the Bondholders or the Trustee.

The Court: Overruled, if that is the only objection.

A. We gave as our reason that we were not bound by the lease.

Q. Well, did you give any instructions to your attorneys, Mr. Elsey, as to what they were to do in connection with the lease?

A. They were to notify The Indianapolis Gas Company.

Q. Of a rejection of the lease?

A. Yes.

The Court: Was that in any minutes of any kind or just orally?

The Witness: I think it was written into the 852 record.

Q. The record of September 9, 1935, shows the authorization of the rejection, but I am about to call your attention to a letter that is attached to the Stipulation, with which you are familiar, no doubt, Mr. Elsey, dated July 23, 1935, addressed to the President of The Indianapolis Gas Company and signed by Thompson, Rabb & Stevenson. You remember that letter?

A. Yes, I remember that letter.

Q. In which it was stated that the City felt that it was not bound by the lease?

A. Yes, sir.

The Court: Was that passed in a resolution?

Mr. Thompson: No, it is not copied into the resolution, your Honor.

Did I say July 23rd? It is July 23rd.

Q. Do you know of any controversy between The Indianapolis Gas Company and the City as to the validity of the lease of September 30, 1913, prior to July 23, 1935?

A. No, sir.

853 Mr. Thompson: Now, Mr. Burns, there are certain averments in the bills in this case about attempts to negotiate between the City of Indianapolis and The Indianapolis Gas Company. As I understand it, you have offered no evidence in support of those averments.

Mr. Burns: I have some correspondence that has been offered, supporting those averments.

Q. Did you attend meetings, which were held in Indianapolis, at which representatives of the stockholders of The Indianapolis Gas Company were present?

A. Yes, sir.

Q. How many of those meetings did you attend, Mr. Elsey?

A. I can't say. There were several of them.

Q. Who was present at those meetings?

A. Well, Mr. Brown was present at one of them—

Q. Mr. Arthur V. Brown?

A. (Continued)—and Mr. Higgins was there, and Mr.—we had one man from Halsey Stuart, I believe, at one time. There have been a good many meetings and I can't remember.

854 Q. Did I attend those meetings?

A. Yes, sir. We also had Mr. Stearns there, representing Estarbrook & Company.

The Court: When were those meetings?

The Witness: I can't give you the dates of them, Judge.

Q. Some of them were in 1935, weren't they, Mr. Elsey?

A. Yes, sir.

Q. Were all of them prior to the time when the complaint was filed in the Trustee's case, here, which was on June 6, 1936?

A. I think most of the meetings were, yes.

Q. Now, I want you to tell the Court whether any statement was made at such meetings as to on what terms and conditions the City of Indianapolis would consider negotiations with The Indianapolis Gas Company.

A. Well,—

Q. First, was any statement of that kind made?

A. Yes. We refused to negotiate unless the bondholders and the stockholders were both fully represented.

Q. And was that stated in everyone of those meetings?

855 A. Yes, sir.

The Court: You mean the bondholders?

Mr. Thompson: Of The Indianapolis Gas Company?

The Witness: Of The Indianapolis Gas Company.

Q. That was definitely stated, and stated by me, personally, in the meeting, was it not?

A. Yes, sir.

Q. That, under no circumstances, would the City of Indianapolis consider any negotiation unless it was participated in by both the bondholders and stockholders of The Indianapolis Gas Company? Is that correct?

A. That is correct.

856 The Court: Is that all?

Mr. Thompson: That is all.

Cross-Examination by Mr. Burns.

Q. Mr. Elsey, the Board of Directors for Utilities of the City of Indianapolis did authorize the representation in connection with the sale of the bonds that the payment of the principal and interest on the bonds is secured by and a charge upon all the revenue from and the operation of all of the gas system owned and/or operated by the City of Indianapolis, did they not?

A. Would you read that again to me?

Q. (The last question was read by the reporter.)

A. Well, I would say we restricted that to the revenue of the Citizens Gas and Coke Utility.

Q. You would say you did not make the representation that was just read to you, is that right?

A. I think not.

Q. You think not?

A. I think not. That seems to be out of line with the—

Q. (Interposing.) This paper which I am calling 857 your attention to, City's Exhibit No. 11, has been offered by Mr. Thompson to show the proceedings by the Board of Directors for Utilities for the Utility District in connection with the issuance of the revenue bonds, and I will ask you to read the language in the middle of page 29 of this transcript, beginning the first four paragraphs. Read it out loud, if you will.

A. (Reading): "The payment of the principal and interest of this and all other bonds of this issue is secured by, and a charge upon, all the revenue from and the operation of all of the gas system owned and/or operated by the City of Indianapolis."

Q. So that the answer to the question I asked you is that you did authorize that representation?

A. Is this in the circular?

Q. That is in the bond itself which the Board of Directors for Utilities authorized the issuance of, and that is in the resolution of the Board of Directors for Utilities authorizing the bond.

A. If this is in the bond then we must have authorized it, but if it is in the circular and not in the bond I would say we had nothing to do with it.

858 Q. Then, as a matter of fact, if it is in the bond, several of the statements you made as to the authority you gave in connection with the sale of these bonds were not accurate, were they?

A. I wouldn't say that.

Q. You would not say that?

A. No, sir.

Q. Did the Board of Directors for Utilities in connection with the sale of these revenue bonds authorize the representation that the City agreed to take all necessary or desirable steps promptly to acquire said property of the Citizens Gas Company of Indianapolis, and also agrees when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause

the same to be continually operated as a gas system in an efficient manner and at reasonable cost and to maintain in good operating condition, and it will use all reasonable efforts to resist competition and to maintain exclusive right to serve gas in the city of Indianapolis and in Marion County and in the towns therein.

Mr. Thompson: From what are you reading, Mr. Burns?

Mr. Burns: I think I am entitled to an answer to the question.

Mr. Thompson: I think Mr. Elsey is entitled to know what Mr. Burns is reading from.

The Court: I think he is entitled to an answer.

A. Will you read that question?

(The last preceding question was read by the reporter.)

A. That would be a matter of record. I can't recollect that language.

Q. You have testified in answer to a great many questions here by Mr. Thompson as to what the Board did or did not authorize, have you not?

A. Yes, sir.

Q. As a matter of fact, you cannot recall what the Board did or did not authorize?

A. I remember the answer to the particular questions Mr. Thompson asked.

Q. That is, Mr. Thompson phrased the answer and 860 you said "Yes" because—

A. (Interposing.) I knew in that case what it was about.

Q. You knew in that case what it was about?

A. Yes.

Q. You do not know whether the Board made this representation or not?

A. I cannot recall.

Q. You did know, did you not, Mr. Elsey, at the time you were considering taking over the property of the Citizens Gas Company that the Citizens Gas Company was operating not only its own property but the Indianapolis Gas property, did you not?

A. Yes, sir, I knew that.

Q. That was a matter that was discussed among the Board of Directors for Utilities frequently?

A. That was discussed often.

Q. So there was not any doubt in the minds of the Board of Directors for Utilities that the property operated by the Citizens Gas Company included both the Citi-

zens Gas Company property and the Indianapolis Gas Company property, was there?

A. We were operating the Indianapolis Gas Company under a lease.

Q. I am talking about what was operated by the Citizens Gas Company.

(The last preceding question was read by the reporter as follows: "So there was not any doubt in the minds of the Board of Directors for Utilities that the property operated by the Citizens Gas Company included both the Citizens Gas Company property and the Indianapolis Gas Company property, was there?")

A. We were operating—

Q. (Interposing.) I am talking about what the Citizens Gas Company was operating; not about what the Citizens Gas and Coke Utility was operating.

A. The Citizens Gas Company was operating the Indianapolis Gas Company at the time under a lease.

Q. You knew that was a fact?

A. Yes.

Q. That was a matter that was frequently discussed in the Board?

A. Yes, sir.

862 Q. And you don't remember whether the Board of Directors for Utilities authorized the representation that the City agrees that when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost and maintain it in good operating condition?

A. We knew that was a provision in the lease.

Q. I am asking you whether you authorized that representation in connection with the bonds which you were selling.

A. I cannot remember that detail.

Q. You cannot remember?

A. Not that detail about it.

Q. You do not know whether you authorized that or not?

A. No, I can't remember the details of the bond.

Q. You, of course, knew when the bonds were sold that the form of the bond would have to conform to the form that was fixed by your resolution, did you not?

A. I am not the attorney; I couldn't say that.

Q. No, but didn't you know that the resolution which

the Board of Directors was passing set forth the form of the bond which was to be sold to the public?

863 A. I should think it ought to.

Q. Were you at that time Vice Chairman of the Board?

A. No, I was the Treasurer.

Q. You were Treasurer?

A. Yes.

Q. But you did hear the resolution read, and went over it and knew what the terms of it were?

A. I may have at that time, yes. I didn't attend all the meetings, but I usually did.

Q. Did the Board of Directors for Utilities authorize the representation in connection with the sale of these bonds that they were offered for the purpose of providing funds for taking over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest?

A. My recollection is that the bonds were sold to obtain money to pay off the obligations of the Citizens Gas Company, that is, the stock, which amounted to \$2,000,000.00 and the accrued dividend of five hundred thousand, one million dollars of bonds—preferred stock—and fifty thousand dollars premium and two million seven hundred odd thousand of the debt that was owed on account of
864 the other Citizens Gas Company bonds.

Q. I am sorry. Perhaps I didn't make my question clear. I stumbled over it. I will read it to you again, ask it again. Did not the Board of Directors for Utilities authorize the representation in connection with the sale of these bonds that the bonds were issued for the purpose of providing funds to take over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest. I am asking you if you did not authorize that representation in connection with the sale of these bonds?

A. I can only remember the figures.

Q. You cannot remember whether you authorized that representation or not?

A. No, it would be impossible for me to remember all those things. I can remember the figures and the specific obligations that were to be taken over and discharged.

Q. You did know in 1935 that the Citizens Gas Company had a lease on the Indianapolis Gas property and was operating it, did you not?

A. Yes.

Q. And that the Citizens Gas Company had that sort of an interest in the property of the Indianapolis Gas Company?

Mr. Thompson: I object to the question because that is a legal conclusion, as to whether that constituted an interest or not.

The Court: Overruled.

A. I knew that that lease existed.

Q. You knew that lease existed and that the Citizens Gas Company had the lease from the Indianapolis Gas Company?

A. Yes.

Q. Would you not consider that the Citizens Gas Company had an interest in that property?

A. The Board took the position that the interest ended with the take-over.

Q. I am asking you whether in May, 1935 you considered that the Citizens Gas Company had an interest in the property owned by Indianapolis Gas which Indianapolis Gas had leased to the Citizens Gas Company?

A. No.

Q. You don't think the Citizens Gas Company had any interest in property which it was holding under lease?

866 A. On advice of our counsel we considered that interest had terminated on the take-over—terminated with the take-over.

Q. You thought they had an interest down to the time of the take-over?

A. Down to the time of the take-over.

Q. On September 9th. So you thought Citizens Gas Company did have an interest in May, 1935?

A. We had an interest, with a doubtful—

Q. (Interposing.) What do you mean by that? Were you a stockholder of the Citizens Gas Company?

A. The Citizens Gas Company had the lease, and we deemed the lease illegal.

Q. Were you interested in any way in the Citizens Gas Company?

A. I was not

Q. Were you, Mr. Elsey?

A. No, sir.

Q. As a director?

A. No, sir.

Q. Or officer?

A. No.

Q. Or stockholder?

867 A. No.

Q. Either common or preferred stock?

A. No.

Q. Or a Bondholder?

A. No.

Q. Then when you referred to "we"—

A. (Interposing.) I was thinking of—

Q. (Interposing.) The Citizens Gas and Coke Utility?

A. Yes.

Q. Now, going back to the question I asked before, in May, 1935 the Citizens Gas Company did have an interest in the Indianapolis Company property, did they not?

Mr. Thompson: I object to the inquiry being pursued further.

The Court: Sustained. Of course, it is a legal question, as I understand, after it was held to be a trust. That is the question we have to determine.

Mr. Burns: Mr. Elsey has gotten up here, and answered a lot of leading questions Mr. Thompson has asked him, simply by saying "yes" in answering them, as to what authority was given. The fact is the authority
868 that was given was to say that the bonds were sold for the purpose of providing funds for taking over all of the property owned by the Citizens Gas Company or property in which the Citizens Gas Company had an interest.

The Court: Go ahead with your next question.

Q. You knew, did you not, in 1935, Mr. Elsey, that the distribution system operated by the Citizens Gas Company included both the distribution system of the Indianapolis Gas Company and the distribution system of the Citizens Gas Company?

A. Well, I knew that the Citizens Gas Company managed the distribution systems of both companies.

Q. And that, as a matter of fact, practically all of the gas was manufactured at the Citizens Gas Company plant and distributed through the mains of both companies?

A. I didn't know that as prior to 1935, because my connection was rather limited, my association with the management was rather limited up to that time.

Q. When did you become familiar with the facts?

A. In 1935.

Q. When in 1935?

869 A. We began to know about it in, you might say the early part of the year.

Q. In the early part of the year 1935?

A. Yes.

Q. When you began to know about it in the early part of the year 1935 did you learn that the Citizens Gas Company was operating not only its own plant but the plant of the Indianapolis Gas Company?

A. I knew they were being operated, but I didn't know to what extent the Indianapolis Gas Company was being operated or the Citizens Gas Company was being operated.

Q. Did you know what proportion of the mains in the City of Indianapolis were owned by the Indianapolis Gas Company and what proportion by the Citizens Gas Company?

A. No. That was a matter of detail that would come up occasionally, but I can't tell you that exactly.

Q. You did know that a substantial part of the mains operated by the Citizens Gas Company used to supply the customers were the mains of the Indianapolis Gas Company, did you not?

A. Yes.

Q. You did not know whether it was forty, or fifty, or sixty per cent?

870 A. Not exactly.

Q. But you knew it was a very substantial part of the total of the number of mains?

A. Yes.

Q. You knew the Citizens Gas Company was distributing gas to the customers in the city of Indianapolis through both its own mains and the Indianapolis Gas Company mains?

A. Yes, sir.

Q. So the Citizens Gas Company was operating the property of both Indianapolis Gas and Citizens Gas Company?

A. Yes.

Q. The answer was "yes"?

A. Yes.

Q. How long have you lived in the city of Indianapolis, Mr. Elsey?

A. Thirty-nine years.

Q. Calling your attention to Plaintiffs' Exhibit 104, attached to the deposition of R. E. Simond did you see this advertisement published by Halsey Stuart & Company and Otis & Company in the three Indianapolis papers on or about July 1, 1935?

A. Well, I may have seen it—I am sure I saw

871 it in one paper. I wouldn't say I saw it in all three.

Q. You are quite certain you did see it in one of the three papers?

A. Yes. I recall seeing that statement. Whether it was in the Indianapolis paper or New York Times or Chicago Tribune, I couldn't tell you.

Q. You do recall seeing this advertisement by Halsey Stuart & Company and Otis & Company, Plaintiffs' Exhibit 104, published in some paper?

A. Yes, sir.

Q. Did you also see on or about the 1st of July, 1935, the circular issued by Halsey Stuart & Company in connection with the sale of these bonds, Plaintiffs' Exhibit 102 to the Simond deposition?

A. Yes. I saw that statement.

Q. You saw that circular on or about the first of July, 1935?

A. I can't remember the date. I saw it when it was issued.

Q. At about the time it was issued?

A. Yes.

Q. So if it was issued July 1st, that was about the time you saw it?

A. Yes.

872 Mr. Burns: That is all.

The Court: That is all.

(Witness Excused.)

(At this point the Court took a recess.)

873 After Recess.

FREDERICK E. MATSON, a witness called on behalf of the defendant City, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name to the Court?

A. Frederick E. Matson.

Q. You reside in Indianapolis?

A. I do.

Q. You are a member of the bar of this Court?

A. I am.

Q. What is the name of your firm, Mr. Matson?

A. Matson, Ross, McCord & Clifford.

Q. Were you employed as attorneys for Otis & Com-

pany and Halsey Stuart & Company in connection with the acquisition by those two companies, or in connection with the making of a bid by those two companies for the bonds of the Utility District which were offered for sale on May 28, 1935?

A. We were.

874 Q. Did you continue to represent those two companies after the bonds were purchased and until the same were resold by them?

A. Yes, Mr. Thompson. Our employment was a little broader than merely giving an opinion on the bonds. It required us to examine the proceedings thoroughly up to the issuing of the bonds and also to follow the proceedings through to see that the transfers were made, because these, being revenue bonds, naturally the security depended upon the proper obtaining of the property, and for that reason we followed clear through.

Q. I call your attention now to an instrument identified as Defendant City's Exhibit 1 to the deposition of R. E. Simond, which was taken in Chicago on the 21st day of February, 1939. You know Mr. Simond, do you?

A. Yes, I do.

Q. Vice President of Halsey Stuart & Company?

A. Yes, sir.

Q. Did you yourself give the opinion of which this instrument that you have in your hand is a photostatic copy?

Mr. Burns: I object. It does not purport to be an opinion.

875 The Court: Go ahead. I don't know what it is.

Mr. Thompson: It is a memorandum.

A. Yes, I prepared this.

Q. After it was prepared did you mail it to Halsey Stuart & Company?

A. I mailed a copy of it to Halsey Stuart & Company and Otis & Company, and I think to your firm.

Q. On what date was that done?

A. That was done August 7, 1935.

Mr. Thompson: That is all.

The Court: Any questions.

Cross-Examination by Mr. Burns.

Q. Mr. Matson, Mr. Simond testified in Chicago that in connection with the sale of these bonds your firm approved a circular issued by Halsey Stuart & Company

and Otis & Company. Do you recall—

A. (Interposing.) I think we looked over that circular.

Q. And approved it for—

A. (Interposing.) Yes, so far as it was in our province to approve a circular of that sort. It was 876 merely a question of whether we found any objectionable statements in it.

Q. Did you notice in that circular that it contained a statement of the cost of reproduction new and the depreciated physical value of the Indianapolis Gas Company property?

A. Well, I don't recall the terms of the circulars. We look over a good many of those. It may have done so.

Q. If in that circular a statement was made as to the cost reproduction new of the Citizens Gas Company and the depreciated physical value of the Citizens Gas Company property and also of the Indianapolis Gas Company property, would not the natural impression of anybody getting that circular be that the City was taking over both of those properties?

Mr. Thompson: I object. He asks for the natural impression of someone getting the circular.

The Court: I think the circular would have to speak for itself on that.

Q. Did you approve this statement in the circular, Mr. Matson: "These bonds constitute in the opinion of counsel valid and binding obligations of the City of Indianapolis, Indiana in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenue of all the gas utility system now or hereafter owned and/or operated by said city and payable solely and exclusively out of such income and revenue"?

A. May I see that, if you please, Mr. Burns?

Q. It is the second paragraph on the first page.

A. I think that is either quoted exactly or paraphrased from our opinion.

Q. And quoted or paraphrased from the language of the bond itself, was it not?

A. I believe so.

Q. Did you have before you when you were passing on this bond issue the transcript of the proceedings which has been introduced in evidence as City Defendant's Exhibit No. 11?

A. Yes, sir, I think we prepared the text of this transcript.

Q. And were you familiar with the fact that that transcript, and particularly the resolution of the Board of Directors for Utilities, authorizing the sale of 878 these bonds, included the representation that the bonds were issued for the purpose of providing funds to take over the property owned by the Citizens Gas Company of Indianapolis and/or in which it has an interest?

A. Yes, sir.

Q. And you knew in May, 1935, that the Citizens Gas Company was operating under a lease from the Indianapolis Gas Company?

A. I knew that, yes, sir.

Q. And that part of the property which it operated and part of the mains through which it distributed gas through the city of Indianapolis was the property of the Indianapolis Gas Company?

A. Yes, I knew that.

Q. And when you approved the circular in July, 1935, about July 1, 1935 you knew that the bond also would provide that it was secured by a charge upon all of the revenue from the operation of all the gas utility system now or hereafter owned and or operated by the City of Indianapolis?

A. I knew that, yes, sir.

Q. And that the city covenanted in connection with the offer for sale of these bonds as follows: "The 879 City agrees to take all necessary or desirable steps promptly to acquire said property of the Citizens Gas Company of Indianapolis and also agrees that when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at a reasonable cost, and maintain in good operating condition, and will use all reasonable efforts to resist competition and maintain exclusive right to serve gas in the city of Indianapolis and Marion County, Indiana."

A. Is that in the circular? It is not in the bond form, is it?

Q. No, it is in the resolution of the Board of Directors for Utilities—

A. (Interposing.) Whatever is in that transcript I knew of and was familiar with at the time.

Q. Of course, you might not be able to remember that

now. You, of course, knew in order to maintain the exclusive right to serve gas in the city of Indianapolis it would be necessary for the Citizens Gas Company to use the mains of the Indianapolis Gas Company?

880 A. I wouldn't go that far here on the stand, sir; that is a legal question.

Q. You knew a large part of the gas was distributed through the mains of the Indianapolis Gas Company?

A. Yes, I knew that.

Q. And perhaps fifty per cent or more of the mains through which the gas was distributed were the Indianapolis Gas Company's mains?

A. Yes, I knew that.

Q. And that you necessarily also knew that if the City gave up that part of the property that it would not have the exclusive right to serve gas throughout the city of Indianapolis?

A. Well, I suppose that if it entirely disconnected itself from that property, it would not, for the time being, have the exclusive right.

Q. And if it rejected the lease and did not take the property of the Indianapolis Gas Company and turned the property back to the Indianapolis Gas Company that then it would not have been exclusively serving all of the city of Indianapolis?

A. Mr. Burns, when the City took over—

881 Q. (Interposing.) I would like to have you answer the question, if you will, please, Mr. Matson.

A. I don't care to answer that question, because I think it involves a legal inference.

Mr. Burns: Will you read the question to the witness, please.

(The reporter read the question as follows: "And if it rejected the lease and did not take the property of the Indianapolis Gas Company and turned the property back to the Indianapolis Gas Company that then it would not have been exclusively serving all of the city of Indianapolis?")

Mr. Thompson: I object to the question, your Honor, on the ground that it calls for the legal conclusion and opinion of this witness, and further it is perfectly apparent if the lease had been rejected, the city, by condemning this property, could have readily continued in the exclusive service of gas in this county.

The Court: I think that is a question that is a
882 question that is hardly fair to ask the witness to answer.

Mr. Burns: We will take an exception.

Q. Mr. Matson, in connection with the circular of Halsey Stuart & Company, Plaintiffs' Exhibit 102 to the deposition of R. E. Simond, which you said that you approved for Halsey Stuart & Company, I call your attention to the language reading as follows: "In that year"—meaning 1913—"the Company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs." Was that language on the circular when you approved it?

A. I presume it was, yes, sir.

Q. And further, "By the terms of this lease, the lessee pays a rental consisting of (a) the interest on the first consolidated mortgage five per cent bonds due October 1, 1952, of which there were \$6,181,000.00 outstanding at the end of 1934, and the interest on such additional bonds as may be issued from time to time for refunding or extensions to the leased property." That language was also there?

883 A. Yes, that is a description of the terms of the lease.

Q. And one of the descriptions of the terms of the lease was it was a lease for 99 years, was it not?

A. That is correct.

Q. Of course, Mr. Matson, I don't have to ask you but the fact is that when you approved this circular you thought it was a proper circular and an exact representation of what Halsey Stuart & Company were offering, or you would not have approved it?

A. I didn't consider there were any misstatements in there.

Q. Mr. Matson, when you gave your opinion in connection with the approval of this bond issue, did that include a certificate that you did not know of any litigation, pending litigation or contemplated litigation involving this property?

A. Well, I think the transcript itself contains such a certificate.

Q. You think the transcript contains such a certificate?

A. Yes, sir.

Q. Will you point it out in the transcript?

A. Here is the certificate, dated June 27th—that is the date the bonds were taken up—signed by the
884 Mayor, City Clerk and City Controller.

"We further certify that no litigation of any kind is now pending or threatened in either state or federal courts seeking to restrain or enjoin, or in any manner questioning the authority or proceedings for, the issuance, sale, execution and delivery of the aforesaid bonds, or in any manner questioning the validity thereof, or the right, authority, or power of said City of Indianapolis to acquire, own and operate or lease to others to operate, the gas plant and property of the Citizens Gas Company of Indianapolis referred to in the above mentioned resolution and in said bonds; that neither the corporate existence of said city nor the title of its present officers to their respective offices is being contested, and that no proceeding or authority for the issuance, sale, execution and delivery of said bonds has been rescinded, revoked, or repealed."

I wrote that certificate myself, and had it signed.

Q. When you wrote that certificate, Mr. Matson, did you know that the City was contemplating rejecting the 885 lease of the Citizens Gas Company?

A. No, I didn't. I don't think I knew what, if any opinion, they had with reference to the 99-year lease.

Q. When you approved the circular of Halsey Stuart & Company you did not know that?

A. I hardly think so. I gave that opinion based upon my knowledge of the entire situation, which was very complete, and I certainly did not know of there being any litigation threatened.

Mr. Burns: That is all.

(Witness excused.)

886 H. S. PAYSON ROWE, a witness called on behalf of the defendant City, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name.

A. H. S. Payson Rowe.

Q. Where do you live?

A. Long Meadow, Massachusetts.

Q. What official connection, if any, do you have with the Massachusetts Mutual Life Insurance Company?

A. I am manager of the Bond Department of that company.

Q. How long have you been manager of its Bond Department?

A. Four and a half years.

Q. Before that time were you connected with the company in any capacity?

A. No, I was not.

Q. Did you attend a meeting at the office of the Chase National Bank in the City of New York on the 11th day of March, 1936?

A. I did.

887 Q. You heard Mr. Beardsley's testimony this morning, did you?

A. Yes.

Q. And the people whom he stated were present were at that meeting?

A. Yes, I believe so.

Q. Your company is the owner of how many bonds of the Indianapolis Gas Company?

A. Two hundred and sixty-five thousand.

Q. Were you advised at that meeting—

The Court: (Interposing.) Two hundred and sixty-five thousand dollars worth of bonds?

The Witness: Yes, sir.

Q. Were you advised at that meeting of March 11, 1936 that the City of Indianapolis had entered into an agreement with the Indianapolis Gas Company in connection with the payment of certain sums of money to the Indianapolis Gas Company and in escrow to the Indiana National Bank?

A. I don't recall. I think that I remember that there was a statement made that the April 1st interest would be paid, and that pending further discussion of the matter
888 that future interest payments would be placed in escrow with the Indiana National Bank.

Q. After you had been advised of that fact your company received from the Chase National Bank of New York an interest coupon—the money for an interest coupon on your bonds, which would be two and one-half per cent of \$265,000.00?

A. That would be the April 1, 1936 coupon. I believe so.

.

Q. You said at the meeting of March 11, 1936 at the Chase Bank you were advised by Mr. Higgins or Mr. Brown or somebody at the meeting that the April 1st coupon would be paid, but that after that the coupons would

897 not be paid. Is that correct? After that the money would be put in escrow?

A. As I remember it, that was so.

Q. Was anything said, as far as you can recall, at that meeting as to the terms or any qualifications or conditions being attached to the April 1st coupons?

A. There were no conditions.

Q. That is, none you were advised of at that meeting?

A. None I knew of. I think we merely transmitted the coupon in the usual way and got our money.

Q. When did you first learn the City of Indianapolis was disputing its liability under this lease?

Mr. Thompson: I object to that question, "disputing its liability under the lease".

The Court: Go ahead and answer the question.

A. I don't know the exact date. It was either the latter part of 1935 or first part of 1936. We keep very close track of the news items. I assume it was when a news item was first published of the matter.

Mr. Burns: That is all.

898 *Redirect Examination by Mr. Thompson.*

Q. You keep close track of the market quotations on the bonds your company owns?

A. Yes, we do.

Q. There was a big drop in the price of these bonds immediately after the transfer of this property to the City, was there not?

A. Without looking it up, I don't remember at the moment. I think there was some market fluctuation.

Q. Was not your attention called to this matter that after the City's denial under this lease, in September, 1935, because of the publicity incident to the transfer, there was a drop in the price of the bonds in the market?

A. I don't remember what month it was; I know it was in the latter part of 1935 sometime.

(Witness excused.)

(A short recess was taken.)

912 Whereupon, the Trial was adjourned until tomorrow, Saturday, March 4, 1939, at nine o'clock A. M.

End Tk 16

914

Indianapolis, Indiana,
Saturday, March 4, 1939,
Nine o'clock A. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

968 WILLIAM J. YULE, being recalled as a witness on behalf of the Defendant, City of Indianapolis, and the individual defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. You are the same Mr. Yule who testified before in this case?

A. Yes.

Q. I asked you, when you were on the stand before, whether there had been served on you, as Secretary of The Indianapolis Gas Company, on September 9, 1935, a rejection by the City of Indianapolis of an assignment of the ninety-nine year lease, and you said that there had. I also want to ask you whether there was also served upon you at that time a certified copy of the City's resolution for a rejection of the lease and a certified copy of the City's resolution for the temporary use and occupancy of the Indianapolis Gas property.

The Court: What date was that?

Mr. Thompson: September 9, 1935.

969 Mr. Burns: I would like to have a general objection to this line of questioning on the ground that it cannot affect either the rights of the Trustee or the bondholders.

The Court: Let the record show the objection overruled.

A. These papers were delivered to me late in the afternoon of September 9, 1935.

Q. When you say "these papers", the papers that I referred to? I say, when you say "these papers," you mean the papers that I have just referred to?

A. The papers that you have copies of here. I have just looked them over. I have them here and they were delivered to me on that afternoon.

Q. That won't get it in the record, Mr. Yule. I am asking you whether the papers that I inquired about were delivered to you on that day.

A. They were delivered to me on that day, yes, sir.

Mr. Thompson: That is all.

Witness excused.

970 WILLIAM G. SPARKS, a witness called on behalf of the Defendant, City of Indianapolis, and the individual defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name.

A. William G. Sparks.

Q. You are a practising attorney and a member of the Bar of this Court?

A. Yes, sir.

Q. What is the name of your firm now, Mr. Sparks?

A. Davis, Pantzer, Baltzell & Sparks.

Q. Were you formerly connected with the firm of Smith, Remster, Hornbrook & Smith?

A. I was.

Q. Was that true during the entire months of August and September of 1935?

A. That is right.

Q. Mr. Henry H. Hornbrook was the senior member of the firm at that time?

971 A. That is right.

Q. And he is now dead?

A. That is right.

Q. Your firm was the attorney, at that time and for many years prior thereto, for the Citizens Gas Company of Indianapolis?

A. That is right.

Q. Did you have any connection or transactions in connection with the transfer from the Citizens Gas Company of Indianapolis of the plant and property owned by it to the Utility District of the City of Indianapolis?

A. I did.

Q. Were you ever advised, prior to September 9, 1935, as to the attitude of the City as to whether it would accept an assignment of a certain lease between The Indianapolis Gas Company and the Citizens Gas Company, dated September 30, 1913?

Mr. Burns: I object to that, your Honor.

The Court: You may have the same objection.

A. I was.

Q. How long before September 9, 1935 were you
972 advised of that fact?

A. I was advised of it about August 27th, 1935.

Q. Do you know of your own knowledge as to whether

Mr. Hornbrook had known of the attitude of the City prior to that time?

A. I do.

Q. For how long a period of time?

A. All I can say is that he knew it for at least a month or maybe longer. I don't know how long.

Q. Was it because of the City's statement that it would not take an assignment of the lease referred to that that assignment was drawn in a separate instrument?

Mr. Burns: I object.

A. That may have been one of the reasons. I don't recall any conversation about that—

Mr. Burns: Will your Honor rule on the objection?

The Court: He says he doesn't know.

A. (Continued.) —or studying it.

Q. That was a matter that Mr. Hornbrook had attended to with Mr. Rabb? Is that correct?

973 A. I can't remember definitely about that. I don't know. My files don't show it.

Mr. Thompson: That is all.

The Court: Any questions, Mr. Burns?

Cross-Examination by Mr. Burns.

Q. You say, Mr. Sparks, that you learned, on August 27th, for the first time, that the City was going to reject the lease?

A. That is right.

Q. That was the first time that you knew anything about that?

A. Yes, that was the first time I had been called upon to do anything in connection with the transfer.

Q. So that any information you have about what Mr. Hornbrook knew prior to August 27th is something that you learned from him or that he told you, but you have no personal knowledge otherwise?

A. Yes, that is right. He told me, by letter that I received the 27th, that the City was going to attempt to reject the lease.

974 Mr. Burns: We ask to have the answer stricken out in his original examination about what Mr. Hornbrook knew, as obviously hearsay.

The Court: Let that go out.

Q. The Citizens Gas Company, as shown by the stipulation, conveyed its property or, at least, the instruments of conveyance which were made out described all of the prop-

erty that the Citizens Gas Company had immediately prior to the delivery of those instruments? Isn't that correct?

A. That was our intent.

Q. And that is what the stipulation shows?

A. Yes.

Mr. Thompson: If the stipulation shows it—

Mr. Burns: I am just leading up to the next question.

Q. And you have represented the Citizens Gas Company continuously since then?

A. We have represented the Board of Directors of the Citizens Gas Company. The Trustees, when the Board had some function to perform, had separate counsel.

975 Q. And the Citizens Gas Company as such has not been in business since that transfer?

A. Not so far as I know.

Q. Or received any property?

A. Not that I know of.

Q. And, in this case, in accordance with the indemnity agreements attached to the bills as Exhibit J in each case, your compensation and expenses are being paid by the City or the Utility District in accordance with the indemnity agreement?

A. They have not been paid. We have never submitted a statement to our client, for any services or disbursements, since that transfer.

Q. But you have an understanding that the Utility District or the City will pay them?

A. Based on that indemnity agreement and the fact that the City did honor our statement, made to our client immediately after the transfer, for services up to that date, but after the transfer—

Q. And have you had any conversations with Mr. Thompson that the City would take care of your fees and expenses in connection with this litigation?

976 A. Whether with Mr. Thompson, or not, I don't know. I think Mr. Rabb—I don't know whether in those words, but I think, on one or two occasions, he has indicated to me, by words, that the City did recognize its obligations to assume any obligations of the Citizens Gas Company in connection with this litigation.

Q. Including your fees and expenses?

A. That is right. I don't know whether we discussed it definitely. That is my understanding and I think that is his. That has never been a very important point for us. We would have gone through, regardless, because of our

long association with the Board of Directors of the Gas Company.

Q. On the 9th of September, 1935, you went with Mr. Rastenburg to the office of Thompson & Rabb and took the four instruments of conveyance, which have been identified in the stipulation?

A. That is right.

Q. At the time you took them there—they had not been recorded, had they?

A. No.

Q. (Continued.) —and left them there, did Mr. Rastenburg deliver them there to Mr. Dithmer, the President of the Board of Directors for Utilities?

A. He handed them either to Mr. Rabb or to Mr. Dithmer. I don't recall which.

Q. And the Board was there in session at that time?

A. A group of men was there which, I was informed, was the Board. I couldn't say they were.

Q. Do you know Mr. Henry Dithmer?

A. I know him by sight.

Q. And was he there?

A. Yes.

Q. And Mr. Rabb was there?

A. Yes.

Q. Was Mr. Thompson there?

A. No.

Q. And the four papers were all handed over together? They were all four numbered in some way?

Mr. Thompson: I object to the question as to them being numbered in some way because the evidence shows just what was done.

The Court: He may state what was done.

978 Q. You may state what was done.

A. They were all four handed either to Mr. Rabb or to Mr. Dithmer or somebody there representing the City.

Q. And then you and Mr. Rastenburg left?

A. No, I stayed for a few minutes until they had a meeting. I think Mr. Rastenburg did, too.

Q. And you waited while the Board of Directors for Utilities had a meeting?

A. That is right.

Q. And about what time of the day was that?

A. I think it was around one o'clock, but I am not certain. I know it was supposed to be in the morning, but

we were late in getting there. It was around noon, as I recall, but I cannot be certain.

Q. Did you take any of those four papers away with you when you left, the four instruments of conveyance that you brought?

A. Not that I recall.

Q. And you have never received any of them back?

A. No.

Q. And as far as you know, the Citizens Gas Company has never received any of them back?

979 A. Not so far as I know.

Q. And did Mr. Rastenburg come away with you?

A. I think so.

Q. And he did not bring any of the four instruments of conveyance away with him when he left?

A. No.

Q. The answer was "No"?

A. "No". That is right.

The Court: That is all.

Mr. Thompson: I have a question, if I may, your Honor.

Redirect Examination by Mr. Thompson.

Q. At this meeting that Mr. Burns has inquired about, there was delivered to you a rejection of the ninety-nine year lease, signed by Mr. Dithmer as President of the Board of Directors, for the Board of Directors for Utilities?

A. Yes.

Q. And a certified copy of the resolution that had been adopted by the Board, rejecting the lease?

A. Yes.

980 Q. And a certified copy of the resolution of the Board for the temporary use and occupancy of the property?

A. I think the latter, yes.

Q. You knew, when you went to the office of Thompson, Rabb & Stevenson, that the City was going to deliver the rejection to you when you turned over physically this assignment of the lease?

A. That is right.

Mr. Thompson: That is all.

Recross Examination by Mr. Burns.

Q. When you say that you received the rejection, Mr. Sparks, of the lease, you mean you received an instrument which was entitled, "Rejection of Lease"?

A. That is what I mean.

The Court: That is all.

Mr. Thompson: That is all.

Witness excused.

981 Mr. Thompson: Your Honor, in connection with the deposition of R. E. Simond, taken in Chicago, and the depositions of J. E. Baker and Chester M. Clark, taken in New York, we have filed a motion to suppress these depositions. If that motion should be overruled, I want to offer the remaining portions of those depositions, which Mr. Burns did not offer in evidence.

The Court: That is, the cross-examination?

Mr. Thompson: And the reexamination and recross, and also, particularly in connection with Mr. Simond's deposition, City's Exhibits 1 to 5, both inclusive.

The Court: Attached to the deposition?

Mr. Thompson: Yes, sir.

Mr. Burns: I might say that, by stipulation shown in each of these depositions, when a deposition was taken, it was agreed by all counsel that it could be used in both cases, and the Trustee and the bondholders objected to the cross-examination or, at least, to the exhibits offered in connection with the cross-examination on the various grounds shown in the deposition, itself, and also on the ground that the correspondence between Thompson &
982 Rabb and Halsey Stuart and the opinion of Mr. Matson are self-serving declarations, not binding in any way.

The Court: You mean the opinion as to the invalidity?

Mr. Burns: No, that is a memorandum that was written sometime in August, 1935, that Mr. Matson testified to yesterday. It seems to me that can have no possible relevancy to any issue in this case. It was not said to be an opinion. It was just labeled, "Memorandum," not signed by anybody and not delivered to anybody who was a party in this case. It was delivered to Halsey Stuart & Company.

The Court: I think I saw a photostatic copy of it yesterday. I don't know whether it was offered or not.

Mr. Burns: No, it was not offered.

We also object to the other exhibits, as well as that opin-

ion or memorandum, on the ground that they are mere self-serving declarations and not such as can bind either the bondholders or the Trustee.

The Court: All right. I will take this question up.
983 Mr. Thompson: If the motion to suppress the deposition of R. E. Simond should be overruled, we offer in evidence a carbon copy of a letter from Thompson & Rabb to Halsey Stuart & Company under date of January 4, 1937.

The Court: This deposition had to do with the action taken by Halsey Stuart & Company?

Mr. Thompson: On the resale circulars, and I point out to your Honor, in connection with that motion to suppress, that the stipulation in this case shows that the named plaintiffs in 1950 all bought their bonds before the transfer was made to the City and that there is no evidence in this case that any present bondholder of The Indianapolis Gas Company bought his bonds in reliance on the bond circular or knew anything about it. The plaintiff, up to this time, has absolutely failed to make one element of estoppel or make any proof in connection with one element of an estoppel.

The Court: All right. I will go into that question.

Do you have any other evidence?

984 Mr. Burns: I would like to object to the City's Exhibits 28 A and B, a letter dated January 4, 1937 from Thompson & Rabb to Halsey Stuart & Company on the ground that it is merely a self-serving declaration. This was in 1937, a year and a half after the bonds were sold.

Mr. Thompson: Your Honor, the reason I am offering this is that it shows what I think Mr. Simond has testified to in part: that these circulars were sent us as a matter of courtesy.

Now, Mr. Burns has attempted to prove some estoppel against the City of Indianapolis because of certain letters that were exchanged, and here again we say in this letter—it was another circular that had been sent to us—"We appreciate that the draft of circular has been submitted to us merely as a matter of courtesy on your part."

Mr. Burns: That is your letter of January, 1937. We call the Court's attention to the fact that this letter that is now offered was not even written until after this suit was filed and after the bill was based on the contentions that we were making as to the effect of the representations that had been made in the sale of the bonds.
985

The Court: Does the record show that these letters, identified by Mr. Higgins, have been read in evidence? If it doesn't, I understood that there was no objection to them, and they may be read in evidence.

The said letters, so offered, respectively marked for identification CITY'S EXHIBITS NOS. 13-B TO 27, both inclusive, were admitted and read in evidence.

Mr. Elam: May we have the record show that all of the exhibits that have been admitted have been read in evidence?

The Court: Yes, all that have been admitted, but there are some that I am withholding the ruling upon.

Do you have any rebuttal?

Mr. Thompson: That is all. The defendant rests.

And the Defendant, City of Indianapolis, and the Individual Defendants Here Rested.

986 The Court: Do you any rebuttal? Would you like a few minutes recess?

Mr. Burns: If we may, your Honor.

(Pursuant to a brief recess, the trial was resumed as follows:)

Whereupon the Plaintiffs, Further to Maintain the Issues on Their Behalf, Offered and Introduced the Following Evidence in Rebuttal, to-wit:

PAUL C. BEARDSLEE, being recalled as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Beardslee, you have testified before in this case?

A. I have.

Q. Did the Chase Bank or you, representing the Chase Bank, either request or suggest to the bondholders, 987 Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company or Savings Bank of Baltimore, plaintiffs in case No. 1950, that that case should be filed?

A. We did not.

Q. Did the Chase Bank agree or have any understanding whatsoever that it would either share any or pay any part of the fees or expenses in connection with the bringing of that suit?

A. Absolutely not.

Q. Has it ever paid any part of the fees or expenses in connection with the bringing of that suit?

A. It has not.

Mr. Burns: That is all.

The Court: That is all.

Q. Oh, there was one other question.

Mr. Thompson has offered in evidence here—the City has offered in evidence here this morning various correspondence between Mr. Bennis of our office and Mr. Higgins and Judge Ewbanks. Did you receive copies of that correspondence between Mr. Higgins and Mr. Bemis, or know anything about it?

A. No, sir.

Mr. Burns: That is all.

The Court: That is all.

Mr. Thompson: That is all.

Witness excused.

VICTOR C. SEITER, a witness called on behalf of the Plaintiffs, being first duly sworn, testified in Rebuttal as follows:

Direct Examination by Mr. Burns.

Q. Will you state your full name, your address, your age and your occupation?

A. Victor C. Seiter; age, thirty-six; residence, 47 South Pennsylvania; Assistant Secretary, Citizens Gas & Coke Utility.

Q. How long have you been connected with the Citizens Gas & Coke Utility?

A. May 1, 1936.

989 Q. And what have been your duties as Assistant Secretary?

A. The usual duties pertaining to such an office and also the keeping of the ledger and the journal for the Utility District.

Q. I call your attention to City's Exhibit 10, introduced, or offered in evidence yesterday, consisting of twelve sheets. Those are photostatic copies, are they not, of twelve sheets taken from the Utility District general ledger of the City of Indianapolis—Utility District City of Indianapolis General Ledger?

A. They are photostatic copies of seven sheets. Part of them reflect the entries made on the reverse side of the same sheets.

Q. And when the entry shows the reverse side, that is

shown by the account appearing on the reverse side of the sheet, "No. 2," is that correct?

A. Yes.

Q. Now, are these sheets in this ledger, which have been identified as Exhibit 10, what you call original entries; that is, is this the original, first entry that is made, or is it 990 transferred from some other account?

A. No, those are books of final entry.

Q. Where is the original entry made?

A. The original entry is made on the books of the Citizens Gas & Coke Utility.

Q. Well, are the entries made on the books of the Citizens Gas & Coke Utility even though the payment is not made—that is, when you are simply accruing the liability?

A. No, that entry is made on the books of the Utility District.

Q. So, then, the only place the various entries that are made of accruing liabilities are on—in this ledger, pages of which have been identified as Exhibit 10, is that right?

A. Yes, sir.

Mr. Burns: Of course, the Court will excuse me, I am not a very good bookkeeper.

The Court: That applies to a good many of us, I guess.

Q. Now, calling your attention to the first two pages 991 of Defendants' Exhibit 10, Account No. 621, Pages 1 and 2 of Sheet No. 1 and Sheet No. 2, that indicates that you accrued amounts from September 9th, 1935 to the end of the year of \$37,333.33 on the ledger, making amount due I. G. Company for the use of property, accruing amount equal to stock interest, is that right?

A. Yes, sir.

Q. Does that also show that that amount was paid, that \$37,333, or is that shown on a separate account?

A. Yes, I could state that this amount—that this statement reflects the amount of \$37,333.33 was paid, not necessarily in a separate check, but it represents the amount paid for the period from September 9, 1935.

Q. To the end of the year?

A. To the end of the year, yes.

Q. And the fact that it has been paid is reflected by the evidence that \$37,333.33 is not carried over in the other year, is that right?

A. That is correct.

Q. And beginning with the 1st of January, 1936, 992 this shows an accrual each month of \$10,000 and the accrual at the end of 1936 of \$120,000, is that correct?

A. Yes, sir.

Q. In 1937 it shows the accrual of an additional amount of \$10,000 a month, and a combined accrual, in 1937, of \$240,000?

A. Yes, sir.

Q. And similarly, by the end of 1938, it shows a total accrual of \$360,000?

A. Yes, sir.

Q. And since then you have simply accrued the January—or you had not,—when these photostats were taken you had not accrued any amount for the month of January, 1939, had you?

A. No, sir.

Q. But as shown by the ledger, you have since accrued the amount of \$10,000 for the month of January, 1939, is that correct?

A. Yes, sir.

Q. These photostats were taken about ten days ago?

A. I should say so, ten days, two weeks ago.

993 Q. Sometime along about the middle or latter part of February?

A. Yes.

Q. Now, without going over these ledger sheets in detail, in general the same scheme has been followed in accruing those liabilities under account No. 622, which is the account for bond interest?

Mr. Thompson: I object to the form of the question. He asks the witness to say that there is a liability, which is a legal question; and then he says it is accrued for bond interest, when it appears upon the face of this account, "equal to the bond interest".

The Court: Of course, those are law questions the Court is going to have to determine. Notice your phraseology of the question so as not to call for any objection. Go ahead. Answer the question.

A. Yes.

Mr. Thompson: I think the witness answered the question. Did your Honor overrule the objection?

The Court: Yes, I told him to go ahead and
994 answer.

Q. And similarly, on account 623, the same scheme has been followed generally as to what has accrued as amounts due I. G. Co. for the use of property, accruing the amount equal to state and local taxes?

A. In that case the payment was actually made, in accordance with the agreement that had been heretofore discussed.

Q. That is, as far as real estate taxes are concerned, they have been currently paid—I mean all of the taxes have been currently paid, to substantially a larger accruing amount, is that correct?

A. Yes.

The Court: These other accounts have been deposited in The Indiana National Bank?

The Witness: The amounts equal to the bond interest and the stock interest have been in escrow.

Q. Now, Mr. Seiter, when did you start to make those entries that are shown in City's Exhibit 10?

A. Is this the Exhibit 10 (indicating)?

Q. Yes.

995 A. These entries were made in the early part of 1936, probably in the month of January.

Q. Then that time is before you came to the Utility District?

A. They were made while I was in the employ of Howard W. Painter, who was retained by the Board of Directors.

Q. For Utilities?

A. Yes, sir.

Q. And while you were engaged by Howard Painter you opened up this ledger, from which Exhibit 10 has been taken, for the Utility District?

A. Yes, sir, under his instructions.

Q. And the entries have been made ever since that time in your hand?

A. Either in my hand or under my direction.

Mr. Burns: That is all.

The Court: That is all.

Witness excused.

Mr. Burns: The plaintiff in the Trustee's case and the plaintiffs in the bondholders case now rest as to the 996 branch of the case which is now being tried. Of course, there are other issues which are to be reserved for later trial.

And the plaintiffs here rested in rebuttal.

The Court: I am wondering if it would not be 999 the proper time now to begin with the stipulation and go through those various exhibits that were offered, and the ruling withheld. You have the stipulation, so I might have a copy of it? As I recall, there are certain parts of the stipulation that were not offered, and there was objection made to the introduction of cer-

tain exhibits attached to the stipulation. Might I have the stipulation?

1001 Mr. Thompson: I have identified as City's Exhibit No. 29 printed objections, which go to Subdivisions 7 (a), (b), (c), (d), (e) and (f); Subdivisions 9 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j); Subdivisions 13 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k);—

The Court: All right. What are the objections?

Mr. Thompson: (Continuing.) Subdivisions 14 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j); Subdivision 15 (c); Subdivisions 21 (a) and (b) to the Stipulation and to an Indemnity Agreement—that is, the indemnifying agreement. May I, instead of reading these objections, hand these to the Reporter as though the objections were stated orally in open court?

The Court: Any objection to it?

Mr. Burns: I suggest you might save a place in the record to attach it as an exhibit instead of copying it in the record, if agreeable.

Mr. Thompson: It is City's Exhibit 29.

1002 The said document, so offered, marked for identification City's Exhibit No. 29, was admitted and read in evidence.

The Court: Does that Exhibit 29 contain all of the objections that you have to any part of the stipulation?

Mr. Thompson: I think so. I can tell you in just a moment.

The Court: If it does, it perhaps would be well for the Court to go over that exhibit and pass on it at a later date, rather than to undertake to do it at this time.

Mr. Thompson: I think it will be for the convenience of the Court and counsel both, if I may offer in evidence—not offering in evidence but as part of this record, as City's Exhibit 30, the typewritten statement that Mr. Burns made in connection with his offer, because in making the objections, he can more readily refer to that statement, if it is identified as an exhibit.

Mr. Burns: I think the Reporter copied it in the record exactly as it is here.

1003 The Court: I have a copy of that—five pages?

Mr. Thompson: Yes, sir.

Mr. Burns: I have not any objection.

Mr. Thompson: I offer this as Exhibit 30, for the convenience of the Court and counsel, with the stipulation

that if it has already been copied in the record, it will not be recopied.

The Court: All right.

The said document, so offered, marked for identification City's Exhibit No. 30, was admitted and read in evidence.

The Court: May I ask Mr. Burns if you want to file something in reply to this?

Mr. Burns: If the Court please, Mr. Thompson filed a long brief two or three weeks ago, dealing with those questions, while the Court was in Florida, and we filed a brief opposing it, so the questions are rather fully briefed.

The Court: May I get those so I can have them together?

Mr. Thompson: We are engaged now, your Honor, 1004 in the preparation of a reply brief, which will be in your Honor's hands in a few days.

The Court: This brief (indicating), filed on January 23rd by the City, and the Citizens Gas Company, on the 1st, and then on February 24th,—those are the briefs.

Mr. Thompson: I can now advise the Court that all objections to any matter appearing in the stipulation itself have been included in the printed objections contained in City's Exhibit 29, but there are two other offers made by Mr. Burns to which I desire to make special objections.

The City of Indianapolis and the other named defendants whom we represent object to the offer of Paragraph 4 of the Stipulation of Facts in the Todd case, appearing on Pages 192 and 193 of Exhibit 2; that is the stipulation that was signed in the Todd case by counsel.

It is preceded by a statement that the stipulation—that the facts are agreed to be true, for the final hearing and disposition of that case; and it seems to me clear 1005 that you cannot take a statement made in a stipulation of facts, which is limited to that case, and signed by the attorneys for the party, and offer it as an admission—successfully offer it as an admission in another case.

The Court: If they stipulated matter as being a fact, I don't know what the law would be with reference to that being in another case, but it would hardly be a fact in one case and not in another. As far as actually going in another, it might apply in an altogether different nature in one case than the other; but as far as being a statement of a fact, the Court accepts the stipulation, of course, as a fact. Now, if it is a fact, what would the law be with ref-

erence to admitting it in another case—as a fact in another case? It would be certainly a fact.

Mr. Thompson: We will be glad to furnish your Honor authorities on that.

And the other objection I have is to Exhibit 89, which is the second, third and fourth grammatical paragraphs from Section 18 of the Answer of the City of Indianapolis in the case of Cotter versus the Citizens Gas Company—No. 1192, In Equity.

The Court: Is that the case in this court that was left pending the outcome of the Todd case?

Mr. Thompson: Yes, sir, that is right.

Mr. Burns: Heard together and decided by the Court of Appeals together.

Mr. Thompson: Now, I object for two reasons to this: The first objection that I have is because the answer in the Cotter case is not pleaded as *res adjudicata* here; but it is claimed to have an effect as an admission against the City of Indianapolis.

Now, in that case the answer was signed by the attorneys for the City of Indianapolis. It was not signed by the City, and it was not verified.

I will be able to furnish your Honor cases that it is well established that an admission contained in an answer does not bind the person making it in another case unless it has been signed by the person, personally. Some of the cases hold, sworn to by him, and has not been only signed by the lawyer, unless it affirmatively appear that the lawyer could not have obtained the information from any other source than his client.

The Court: You may furnish authorities.

Mr. Thompson: Yes, I will be glad to.

I also object to both of these—to both Exhibit 89 and to Paragraph 4 of the Stipulation of Facts in the Todd case because they are partial offers, really selections of certain paragraphs of the answer and certain paragraphs of the stipulation, and the context does not fairly appear.

Mr. Burns: If the Court please, if that is true, we are perfectly willing to offer the entire document; but we did not because we did not want to encumber the record. We are perfectly willing to have counsel offer what other parts he wants, or the entire document. We think it is entirely a fair excerpt and fairly sets forth what the admission was in both cases.

I think the authorities are very clear and have a number of cases from the Supreme Court that an admission

made by a party in one case is admissible against that party in another different litigation.

The Court: Suppose we fix a time for the filing of authorities and briefs upon these questions. I should like to have opportunity to study on that—the number of the exhibits and where the ruling has been reserved; and then give your authorities so we can take this up several days following. Then I can connect it up. Can you do that within the next five days?

Mr. Thompson: Be glad to.

The Court: That is 4, is it, Mr. Rabb?

Mr. Rabb: Yes, sir.

Mr. Thompson: I will not be here, but Mr. Rabb in my absence—

The Court: I want to fix a time—Mr. Burns file something by the 15th?

Mr. Burns: In reply, by the 15th, I shall be glad to.

Mr. Thompson: I am not sure the record shows—I think it does, your Honor—that an objection was made to an exhibit which was the brief in the Supreme Court of Indiana filed by the City in the Williams case.

Mr. Burns: You objected. There is no doubt on that.

I think the Court reserved his ruling.

1009 The Court: I recollect that I made some comment on that.

Mr. Rabb: Exhibit 3—the appellant's brief.

Mr. Thompson: I want to object to any part—

Mr. Burns: Oh,—

Mr. Thompson: I make no objection insofar as it sets out the pleadings in the Williams case.

Mr. Burns: We simply had it identified—that was the method of showing those pleadings. We don't offer anything except the pleadings out of that.

Mr. Thompson: As to that we want the same objection, to that offer, as we had to the stipulation, on the ground that the Williams case is not *res adjudicata* of any question involved in this case.

The Court: Present all those questions at the same time.

Now, as I recall, Mr. Thompson, you made an offer to introduce other parts of the stipulation than were offered by—and is there some objection to that?

Mr. Burns: Yes, sir.

The Court: What were those parts of the stipulation?

1010 Mr. Burns: The parts of the stipulation which we did not offer are certain paragraphs of Section 18 of the stipulation—Section 18 of the stipulation identifies some twenty-three or four different documents, almost all of them letters, between The Indianapolis Gas Company and the City of Indianapolis.

The Court: Is that upon the theory that the plaintiff would not be bound?

Mr. Burns: That is going to be the basis of our objection. We offered certain of those letters and the paragraphs of the stipulation which identified them—the top of Page 2 would show what I gave the Reporter, namely, Sub-paragraphs, 1, 2, 9, 10, 13 and 14 of numbered Section 18 of the Stipulation; and we offered the six exhibits which were identified in those paragraphs of the Stipulation.

The Court: Those paragraphs contain certain letters?

Mr. Burns: Those paragraphs identify the letter and then the letter was attached as an exhibit, and we offered the paragraph so identifying the letter and the
1011 letter referred to in that paragraph of the stipulation.

The Court: Mr. Thompson has offered the remainder?

Mr. Thompson: Yes, sir.

Mr. Burns: He has offered the remainder of that paragraph. And we object to the remainder of that paragraph, and to each of the documents identified therein, and, perhaps, for clarity, I should refer to the numbers of the paragraphs and the numbers of the exhibits to which we are objecting.

We are objecting to numbered paragraphs and, Mr. Reporter, parenthetically, those are Roman numerals—

The Court: On Page 29?

Mr. Burns: We object to numbered paragraphs III, IV, V, VI, VII, VIII, XI, XII and XV to XXIII, both inclusive, and to the exhibits identified therein. The exhibits so identified are Nos. 60, 61, 62, 63, 64, 65, 68, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84 and 85.

The plaintiffs object to these paragraphs of the stipulation and each of the exhibits identified therein, as just described, because they are letters exchanged between The Indianapolis Gas Company and the Utility District, or between The Indianapolis Gas Company and
1012 counsel for the Utility District, Thompson, Rabb &

Stevenson, or between counsel for the two parties; and none of those letters is binding on the Trustee or bondholders or can affect, in any way, the rights of the bondholders, since no action between The Indianapolis Gas Company and the City could prejudice or affect the bondholders' rights or the Trustee's rights.

We also object to one or two resolutions which are included among—perhaps I had better refer to that exhibit. It is Exhibit No. 70, identified in Paragraph XII of Section 18. We object to that especially on the ground that the resolution of the Board of Directors for Utilities is merely a self-serving declaration and cannot be used to prejudice the rights of the bondholders or Trustee. We also object to all of the exhibits previously enumerated and identified in Section 18 of the stipulation on the ground that they cannot be received as evidence of the facts recited therein, being merely a hearsay statement of the facts stated in such letters or documents.

1013 The Court: Well, would you not think it would be fair to have all of this before the Court, in view of the fact that Subdivisions 1 and 2 had letters from attorneys for the Utility District of the Gas Company, or some officer, that were introduced by the plaintiff? I think we should have the entire picture here. I don't know what they contain. I do notice that Sub-paragraphs 1 and 2, which were introduced by the plaintiff, refer to letters which passed between counsel and the Department of Utilities of the Gas Company and The Indianapolis Gas Company. Now, these offers, so far as the letters are concerned, appear to be the same.

Mr. Burns: I think the same general character, without any doubt, but I think the rule is this: if I sue Mr. Elam, he can bring in and offer against me, in that lawsuit, letters I had written, because they are admissions; but I cannot bring in letters that I have myself written and offer them against Mr. Elam, because those are merely self-serving declarations. Similarly, I can bring in letters Mr. Elam has written, because they are admissions by him, but Mr. Elam cannot offer, on his own
1014 behalf, letters he has written because they are only his self-serving declarations.

The Court: Don't you think this would be competent for the purpose of showing the attitude of the Utilities Department in paying this money in, and that is the purpose of them, as I understand.

Mr. Thompson: That is right.

Mr. Burns: If that was important, I think it might be competent, but I think no arrangement or attitude on the part of the Utility can make any difference, since they took the property and operated it.

The Court: I feel like I can pass on this objection at this time, simply to show as to whether or not there is estoppel here, by acting under the lease, and show why—I think that would be my ruling on that.

Mr. Burns: May we have an exception?

The Court: The objection advanced to the various subdivisions of Section 18 of the stipulation, made by the plaintiff, will be overruled and exception given; and as far as that section is concerned, it may be read in evidence.

1015 The said SECTION 18 of the Stipulation, so offered, was admitted and read in evidence.

The Court: Are there objections now to any other parts, Mr. Burns, that have been offered by Mr. Thompson, that were not offered by the plaintiff?

Mr. Burns: Well, I have made objections from time to time, during the course of Mr. Thompson's testimony.

The Court: I am referring now to the stipulation.

Mr. Burns: No, that concludes our objections to any—just a moment.

The Court: May I make myself clear, I am referring to certain parts of the stipulation, not offered by the plaintiff, and that Mr. Thompson offered.

Mr. Burns: No, I don't object to any other parts of the stipulation.

The Court: May the record show at this time that Exhibit 1, which is the stipulation, is read in evidence, with the exception of the objections which have been reserved to certain parts of it. I think there was some reservation as to certain parts.

1016 Mr. Thompson: Yes, your Honor.

The said Stipulation, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 1, was admitted and read in evidence, with the qualification as stated by the Court.

1035 Whereupon, the trial was concluded.

PLAINTIFF'S EXHIBIT NO. 133.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1950) * *

DEPOSITION OF ROBERT E. SIMOND.

\\ ("Notice to take Deposition, and Proof of Service there-
of omitted in printing.")

(Inserted pursuant to stipulation filed November 22, 1939.)

\\ IN THE DISTRICT COURT OF THE UNITED STATES.

* * * * *

The Deposition of Robert E. Simond, taken on behalf of the plaintiffs in the above entitled actions before William C. Meyer, a Notary Public of Cook County, Illinois, on the 21st day of February, A. D. 1939, at the office of Nicholson, Snyder, Chadwell & Fagerburg, Room 2360, The Field Building, 135 South LaSalle Street, Chicago, Illinois, pursuant to notices hereto annexed.

Present:

Messrs. Baker, Hostetler & Patterson, by

Mr. Howard F. Burns,

appeared for plaintiffs;

Messrs. Thompson and Rabb, by

Mr. W. H. Thompson,

appeared for the City of Indianapolis and the Members of the Board of Trustees for Utilities and the Board of Directors for Utilities of the City of Indianapolis;

Messrs. Davis, Pantzer, Baltzell & Sparks, by

Mr. W. D. Sparks,

appeared for Citizens Gas Company of Indianapolis;

Mr. William R. Higgins.

appeared for The Indianapolis Gas Company.

* * * * *

("Stipulation as to waiver of notice, waiver of signature, etc., omitted in printing.")

(Inserted pursuant to stipulation filed November 22, 1939.)

ROBERT E. SIMOND, a witness called on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Simond, will you state your full name, your age, and your occupation?

A. Robert E. Simond. My age, 49; vice-president Halsey Stuart, in charge of municipal buying in the Chicago office.

Q. When you say "in charge of municipal buying," you mean in charge of the buying of Municipal bond issues and so forth?

A. That is correct.

Q. How long have you been connected with Halsey Stuart & Company?

A. Twenty-five years.

Q. Twenty-five years. And during that time what various offices have you held with Halsey Stuart & Company?

A. Assistant cashier, 1916; then in the Municipal Department from 1916 to the present date.

Q. And you have been head of the Municipal Department during all that time?

A. For about ten years.

Q. For the last ten years you have been head of the Municipal Department?

A. That is right.

Q. Do you have charge of both the purchase and the sale of municipal securities?

A. Well pretty much so.

Q. That is the whole Municipal Bond Departments are under your charge?

A. Yes, under our jurisdiction.

Q. So that you have charge both of the purchase of the securities and the marketing of them after Halsey Stuart & Company has purchased them?

A. Well, fixing the terms of marketing and so forth.

Q. The actual Sales Department is under somebody else?

A. Under the sales heads.

Q. Under the sales heads. Is Halsey Stuart & Company an Illinois corporation?

A. An Illinois corporation.

Q. And you are, you say, vice-president of the company?

A. That is right.

Q. Are you also a director?

A. No, sir.

Q. How many offices has Halsey Stuart & Company throughout the country?

A. I would say two offices, and representatives in Boston, Philadelphia, St. Louis, Detroit, and Milwaukee. They have office space in Boston, Philadelphia, Detroit, and St. Louis, and then representatives, at least one or more, without office space to my knowledge, in Milwaukee, Minneapolis, Omaha, Pittsburgh, Cincinnati—

Q. Indianapolis?

A. No, sir.

Q. No office or representative located in Indianapolis?

A. The gentleman who covers Indiana occasionally, he travels out of Champaign, Illinois.

Q. And his territory includes Indianapolis?

A. That is right.

Q. What is his name? Is it Mr. W. R. Cosby?

A. W. R. Cosby.

Q. And he comes to Indianapolis from time to time and visits bond buyers and also banks or other people interested in the purchase of securities?

A. Yes. How often he goes there I can't answer. His sales manager could answer that. I don't know how often he goes there.

Q. You said you had two offices. Those are the offices in Chicago and New York?

A. In Chicago and New York.

Q. And in the other cities you mentioned—

A. We have an office in Philadelphia, Detroit and St. Louis.

Q. You have offices in Philadelphia and Detroit?

A. Yes, where we have office space.

Q. And those offices are the headquarters of your sales representatives in those territories?

A. That is right.

Q. Do you also have an office in Cleveland, Ohio?

A. Yes—not an office; we have a sales representative.

Q. Does he have office headquarters there?

A. I don't think so, no. He travels out of his home.

Q. That is, he lives in Cleveland?

A. He lives in Cleveland.

Q. He covers the territory in and around Cleveland in the sale of securities?

A. That is right.

Q. Did you attend this deposition in response to a subpoena?

A. That is right, yes, sir.

Q. Have you the subpoena with you?

A. Yes, sir.

Q. May I see it?

A. This is one of the copies (handing document to counsel).

Q. Well, you received a subpoena in each of these cases, is that correct?

A. That is right.

Q. And the paper you have just handed me is a copy of the subpoena which you received in one of these cases?

A. That is correct.

Mr. Burns: I will ask the notary to mark it as P X 101. I think so as to save confusion with the exhibits already marked in connection with the stipulation, I will start with 101 and work from there.

(Said document was marked as requested P X 101.)

Mr. Burns: Q. In May or June, 1935, Halsey Stuart & Company and Otis & Company bid for and bought eight million dollars principal amount of bonds of City of Indianapolis Gas Plant Revenue bonds, dated June 1, 1935, is that correct?

A. That is correct.

Q. Did you have anything to do with the negotiation or consummation of that sale?

A. With the negotiations.

Q. And what did you have to do with it?

A. Establishing a price which we could offer for the bonds.

Q. Establishing the price which Halsey Stuart & Company could offer the city for the bonds?

A. That is right. Halsey Stuart and Otis joined in that.

Q. Yes.

A. And the preparation of the bid itself which was submitted; then after we purchased the bonds, the preparation of the circular, arranging for the legal opinion, and my recollection is at the suggestion of the city we arranged for the preparation of the blank bonds as a matter of expediency. They were prepared here in Chicago.

Q. Now you said you arranged for or looked after the preparation of the circular which was used in the sale of those bonds. Have you a copy of that circular with you?

A. Yes, sir.

Q. May I see it?

A. Yes, sir (handing document to counsel).

Q. Is this an extra copy of the circular that we could have?

A. Yes, sir.

Mr. Burns: I will ask to have the reporter mark this P X 102.

(Said document was marked as requested P X 102.)

Q. Calling your attention, Mr. Simond, to P X 102, which I have just had marked, is that the circular which was prepared under your direction by Halsey Stuart & Company in connection with the sale of these bonds?

A. Yes, sir.

Q. And this was used, this same circular was used throughout your campaign in the sale of the bonds?

A. In the preliminary offering.

Q. What do you mean by the preliminary offering?

A. Well, in September we revised it slightly in the form of a sales memo, having some of the bonds remaining on hand, and we made a supplemental offering at that time.

Q. In September, 1935?

A. I think it was about September, 1935.

Q. Have you the supplemental one that you prepared in September, 1935?

A. September 28th (handing document to counsel).

Mr. Burns: I will ask to have this marked P X 103.

(Said document was marked as requested P X 103.)

Mr. Burns: Q. Now this paper which you have shown me, Mr. Simond, marked P X 103, was issued by Halsey Stuart & Company on about September 28, 1935?

A. Yes.

Q. And was circulated by it in connection with the previous circular which has been identified as P X 102?

A. That is right. This was circulated among our sales organization.

Q. Simply among your sales organization?

A. Yes.

Q. The circular, P X 103, wasn't intended for circularization to the public, but merely to your sales organization?

A. That is right.

Q. And, as far as you know, the mimeographed sheet, P X 103, was not circularized to your—

Mr. Thompson: This question calls for something that the witness can have no possible personal knowledge of.

Mr. Burns: Q. —to the public generally, but only to the sales organization?

Mr. Burns: Will you read the question?

(Question read.)

A. My recollection is it wasn't circularized generally.

Q. That is, it went only to the sales organization?

A. To the sales organization. It was prepared for that purpose.

Q. And even after the preparation of P X 103 you continued to use the printed circular, P X 102, for the sale of the bonds to the public?

A. Well I can't answer that. I assume the salesmen referred to both. I can't answer that.

Q. You can't answer that?

A. I can't answer that.

Q. The circulars, P X 102, were still out and in the hands of your salesmen?

A. There was still a supply of them, yes.

Q. By the way, have you an extra copy of P X 103 so we can keep this for the record?

A. Yes, sir.

Q. Did Halsey Stuart & Company get out any other circulars for circulation among the public generally except this printed circular P X 102?

A. It seems to me I saw one covering \$510,000. That was fully a year and a half later. The text was the same.

Q. The text was the same?

A. The text was the same. It simply reduced the amount.

Q. At that time Halsey Stuart simply had about \$510,000 of them left and a supplemental circular was put out with the same text as P X 102?

A. Practically the same text.

Q. But indicating there were only 510,000 left?

A. That is right.

Q. Now can you tell me at the time the circular, the mimeographed circular, P X 103, was put out, about how many bonds Halsey Stuart & Company had left on their shelves?

A. I couldn't tell you.

Q. You couldn't tell me whether it was one million or two million?

A. No, I can't tell you, Mr. Burns.

Q. When you say the supplemental circular was put out similar to P X 102, indicating there were 510,000 of

the bonds left, did that mean that Halsey Stuart and Otis & Company had, or Halsey Stuart & Company had?

A. We had jointly.

Q. In the trading account?

A. In the trading account.

Q. Now in addition to the circular, P X 102, did Halsey Stuart & Company and Otis & Company, either separately or jointly, advertise these bonds in various newspapers?

A. Yes, sir.

Q. Have you a copy of the advertisement which they used?

A. This was a copy of the ad that appeared July 1st in the Boston Herald (handing document to counsel).

Q. Is this something that you wish to keep yourself?

A. I would like to.

Mr. Thompson: May I see it, please?

Mr. Burns: Q. Have you a record showing in what other papers that advertisement appeared, Mr. Simond?

A. I am afraid not. I would have to rely on my memory, but I know it appeared in New York and Chicago.

Q. And Boston?

A. And Boston. I mean aside from Boston it appeared in New York and Chicago. I generally just keep one copy for my own file record. I know it appeared, I will say broadly. It appeared in Cleveland also, because Otis & Company's advertisement appeared there.

Q. Now calling your attention, Mr. Simond, to a photostatic copy of a newspaper advertisement, which I will ask the stenographer to mark P X 104—

(Said document was marked as requested, P X 104.)

Q. —I will ask you if that is a copy of the advertisement used by Halsey Stuart & Company and Otis & Company in the newspapers of July 1, 1935?

A. It appears to be.

Q. And have you compared that with the advertisement which you produced from the Boston Herald?

A. May I glance at it? I didn't compare it.

Q. Will you?

Mr. Thompson: I assume, if Mr. Burns says this is a photostatic copy taken from some paper, we have no disposition to ask the witness to sit here and compare this thing. I am willing to agree that—

A. It appears to be a photostatic copy.

Mr. Burns: Is counsel willing to agree that this is a true copy of the advertisement which Mr. Simond has produced?

Mr. Thompson: On your statement, Mr. Burns, that it is a photostatic copy, we will so agree.

Mr. Sparks: That is right.

Mr. Burns: I will state that this is a photostatic copy, that P X 104 is a photostatic copy taken from the home edition of the Indianapolis Times of July 1, 1935. May that be stipulated?

Mr. Thompson: I will take that on your statement, Mr. Burns.

Mr. Sparks: Yes.

Mr. Higgins: Yes.

Mr. Thompson: I do not mean to agree by that that I believe it to be competent, but as far as its authenticity is concerned, yes.

Mr. Burns: Q. Did the same or substantially the same advertisement appear, Mr. Simond, in the Wall Street Journal of July 1st?

A. It appeared in New York. I don't know the name but we used the Wall Street Journal.

Q. How about the New York Times?

A. The New York Times.

Q. The New York Herald Tribune?

A. The New York Herald Tribune. These are the papers we used. I can't say that it actually appeared in all those papers.

Q. You don't know in how many of those it appeared?

A. No, but I know it was given broad publicity.

Q. You know that it was given broad publicity?

A. Yes, sir.

Mr. Burns: Well, to save the trouble of proving it in some other way, if counsel is willing to agree that it is the fact, I will state that this advertisement, P X 104, has been compared with advertisements appearing in the Indianapolis News of July 1, 1935, the Indianapolis Star of July 1, 1935, the New York Times of July 1, 1935, the Chicago Tribune of July 1, 1935, the Wall Street Journal of July 1, 1935, and the Cleveland Plain Dealer of July 1, 1935, and that the advertisement in each of those papers is identical with P X 104, except that in one or two cases the order of the names, Otis & Company and Halsey Stuart & Company is reversed, and in the New York editions of the papers Otis & Company, I suppose in order to comply with the New York law, used the word "Incorporated" after the name Otis & Company.

Mr. Thompson: On behalf of the City of Indianapolis I am willing to make such an agreement, provided it is

agreed by you that in none of these advertisements did the name of the City of Indianapolis appear as a signer of such advertisement.

Mr. Burns: Well it appears right on its face that it didn't.

Mr. Thompson: I know, but then—

Mr. Burns: I am perfectly willing to agree that the City of Indianapolis does not appear as a signer of this advertisement.

Is other counsel willing to agree that these papers—

Mr. Sparks: Yes, on the agreement that nobody appears as a signer except as indicated in that exhibit.

Mr. Burns: That is perfectly all right.

Q. Do you know whether this advertisement of July 1, 1935, appeared in any papers in Chicago other than the Chicago Tribune?

A. Probably the Journal of Commerce.

Q. Probably the Chicago Journal of Commerce?

A. Yes.

Q. The Chicago Daily News?

A. I should say the News and American.

Q. Probably the Chicago Daily News and the Chicago American, the two evening papers and the Journal of Commerce, and the Chicago Tribune?

A. Yes; maybe the Herald & Examiner in the morning, that I don't know.

Q. That you don't recall?

A. No.

Q. But you would say that very wide currency was given to this advertisement, P X 104, throughout the country?

A. That is correct—throughout the country? I can't say that, I don't know about the west coast.

Q. Over what territory does Halsey Stuart & Company advertise?

A. The middle west.

Q. As far west as the Mississippi river?

A. Oh yes. I don't know that we advertise in San Francisco or Seattle.

Q. Yes, but over the east and the middle west you would say the advertisement was given very wide currency in the newspapers?

A. I don't know how to construe that "wide currency." It was given—I am sure it was given publicity where we had sales representatives.

Q. And you had sales representatives through most of the east and the middle west?

A. Through most of the east and middle west.

Q. Now, did Halsey Stuart & Company later get out a different form of advertisement in connection with the sale of these City of Indiana Gas Plant Revenue Bonds?

A. What do you mean by "legal"?

Q. Beg pardon?

A. What do you mean by "legal"?

Q. No, later.

A. Oh, later. I don't know, Mr. Burns. They may have. That would have been handled by our advertising department.

Q. Well, to refresh your recollection, I show you a photostat of an advertisement appearing in the Indianapolis Star of July 8, 1935, and ask you whether you can identify that?

A. I can't identify it without having seen an original. I don't recall at this date.

Q. You can't recall at this date whether that advertisement was published?

A. I would say it is our form and our type and everything but—

Q. From an inspection of it you would say that it looks as though it were your advertisement?

A. That is right.

Q. Do you notice in there a reference to some booklet, booklet S. J. 7, in one of the little boxes at the bottom?

A. Yes.

Q. Is that a booklet Halsey Stuart put out for bond buyers?

A. Well I can't answer that definitely. I know we get out a series of booklets but I don't read them; I have no time to read them, and I don't prepare them. They are prepared by our advertising department.

Q. From an examination of that advertisement which I have just shown you, you haven't any doubt that is is a photostat of the Halsey Stuart advertisement?

A. No.

Mr. Burns: I will ask to have the reporter mark the photostat, of which we have just been inquiring, P X 165. (Said document was marked as requested, P X 105.)

Mr. Burns: May it be stipulated that this photostat, P X 165, is a photostat of an advertisement appearing in the Indianapolis Star for July 8, 1935.

Mr. Thompson: Subject to the same stipulation that it isn't signed—this is just one specific publication?

Mr. Burns: That is right.

Mr. Thompson: Yes, I will agree to that.

Mr. Higgins: Yes, we will agree.

Mr. Burns: Mr. Sparks?

Mr. Sparks: Yes. What was the date?

Mr. Burns: July 8, 1935.

Mr. Higgins: In the Star?

Mr. Burns: In the Indianapolis Star.

Q. Would you have in your records of Halsey Stuart & Company, Mr. Simond, any record of the papers in which the advertisement of July 1, 1935, P X 104, and the advertisement of July 8, 1935, P X 102, appeared?

A. Yes, our vouchers would show that.

Q. Your vouchers would show that?

A. Yes.

Q. Can you get that information for us?

A. Yes.

Mr. Thompson: It is agreed that the witness in answer to the last question may furnish a list to the reporter of the newspapers in which P X 104 and P X 105 were inserted by Halsey Stuart & Company.

Mr. Burns: And the dates of such insertions?

Mr. Thompson: Yes, and the dates of such insertions.

The Witness: Do you want that certified?

Mr. Thompson: No.

Mr. Burns: No, just give him a letter and we would like it soon, because I take it it won't be very hard for you to get.

Q. Now in connection with the purchase of these bonds, Mr. Simond, did the city prepare and give to Halsey Stuart & Company a transcript of the proceedings, or something of that sort, upon which the bonds were to be issued?

A. That is right.

Q. Have you got a copy of that with you?

A. Yes, sir.

Q. May I see it?

A. (Witness hands document to counsel.)

Mr. Burns: I will ask to have this marked P X 106.

(Said document was marked as requested, P X 106.)

The Witness: I would like to keep that copy if I may.

Mr. Burns: All I want to do is to have an opportunity to make a copy of it.

Q. Mr. Simond, calling your attention to the transcript

which you have produced, and which is marked P X 106, I will ask you if this is the transcript which Halsey Stuart & Company received in connection with the purchase of the City of Indianapolis Gas Plant Revenue Bonds?

A. That is right.

Q. And the information contained in this transcript was relied upon by Halsey Stuart in the purchase of those bonds?

A. That is correct.

Q. Do you know from whom Halsey Stuart & Company received this transcript?

A. It is just recollection, but we got that with the delivery of the bonds, so I presume the City Treasurer brought that up with the bonds.

Q. The City Treasurer of the City of Indianapolis?

A. That is right, that being a customary procedure.

Q. You had previously examined various parts of the documents that made up this transcript, I take it?

A. Our attorneys had.

Q. Your attorneys had. And your attorneys in this transaction were who?

A. The firm of Matson, Ross, McCord & Clifford.

Mr. Burns: Well now may it be stipulated, for the purpose of saving expense in the copying of this transcript, which contains some 72 pages, that the copy of the transcript in the possession of the city will be produced at the trial and that every one will agree that it is a correct copy of this transcript which has been identified as P X 106?

Mr. Thompson: Yes.

Mr. Sparks: That is right.

Mr. Burns: Q. Mr. Simond, in the event that we are unable to locate another copy of this transcript, will it be agreeable to you to have the reporter or somebody from Mr. Snyder's office make arrangements with you to have this copied as long as it is returned safely to you?

A. Yes, sir.

Mr. Burns: I take it that that is perfectly agreeable to counsel, in the event that we can't locate a copy of the transcript?

Mr. Thompson: Certainly. I just agreed that we have got one copy.

Mr. Burns: I know it, but sometimes they turn out not to be identical, or something of that sort.

Mr. Thompson: It is a certainty that Mr. Matson's firm will have a correct copy because they gave their opinion.

Mr. Burns: Yes.

Q. Mr. Simond, calling your attention to a photostatic copy of a letter dated September 20, 1935, I will ask you if you recognize that as a letter from your office?

A. Well I can say this, that the gentleman who signed the letter was and is in our employ.

Q. And you recognize his signature?

A. I recognize his signature.

Mr. Higgins: A letter to whom?

Mr. Burns: To Newton Todd.

Q. Is this man now here in Chicago?

A. No, sir.

Q. Where is he located?

A. You mean this man Walter?

Q. Yes.

A. In Minneapolis.

Q. Was he located here in Chicago at that time?

A. Yes.

Q. And you do recognize his signature attached to that letter?

A. I recognize his signature.

Q. And is W. R. Cosby, who is referred to in this letter which I have had marked P X 107, the same Cosby who you said traveled out of Champaign, Illinois, and covered Indianapolis?

A. That is correct. I may be mistaken about his home address being Champaign. I know he lived there.

Q. That isn't very vital.

A. In either Champaign or Urbana.

Q. The circular, Mr. Simond, referred to in that letter would be the circular, P X 102, which was currently in use by Halsey Stuart & Company?

Mr. Thompson: If you know of your own knowledge.

A. I don't know. I haven't seen this letter before.

Mr. Burns: Q. Was there any other circular that you were using at that time?

A. My assumption is—and it is only an assumption—that it refers to the circular of July 1st, because he shows here the available maturities.

Q. That is the circular identified as P X 102?

A. That is right.

Q. That is the circular which was then in current use by Halsey Stuart & Company in the marketing of these bonds?

A. That is right.

Q. Now showing you another letter, Mr. Simond, or

photostat of letter marked P X 108, is that your signature shown on that photostat?

A. Yes, sir.

Q. And did you write that letter on or about the date shown thereon?

A. Apparently so.

Q. And calling your attention particularly to your statement, "a circular of which released at the time of our general offering over a year ago is enclosed herewith". Can you identify from that what circular it was?

A. The one of July 1st.

Q. P X 102?

A. Yes, sir.

Q. A copy of P X 102 was the circular which you enclosed in the letter to Mr. Todd, P X 108?

A. That is the circular, because it refers to the one released at the time the bonds were offered generally.

Q. You haven't any doubt about it, have you, that that is the one you enclosed?

A. No, I haven't much doubt about it. I can't say for a certainty, but from the description and the reference in the letter, that is the one.

Q. There wasn't any other circular which you issued at the time the bonds were generally offered, was there?

A. Not at that time, no, sir.

Q. Now calling your attention particularly to the last sentence of that letter, Mr. Simond,—“The statements contained therein”—when you said “therein” you were referring to the circular, were you not?

A. That is right.

Q. —“were approved by attorneys for the City and by engineers whose report on this project was available to us”?

A. That is right.

Q. When you wrote that you understood that to be the fact, did you not?

A. Yes, sir.

Q. And you still understand that to be the fact?

A. Yes, sir.

Q. I show you a photostat of a letter, or a carbon copy of a letter marked P X 109. Can you identify that as a photostat of the carbon copy of the letter which you were answering to Mr. Todd?

A. Not very well, Mr. Burns.

Q. You haven't brought that letter with you, the letter from Mr. Todd?

A. No, sir.

Q. You would have it in your files at the office?

A. Probably in the sales files, yes, sir.

Q. And you could check that up and identify it?

A. Yes, sir.

Q. Have you with you, Mr. Simond, the other papers that were subpoenaed for you to bring here?

A. Have you a copy of the subpoena?

Q. I have.

A. Under (c) "The use which the City of Indianapolis expected to make of the proceeds of the sale of the Gas Plant Revenue Bonds it expected to issue or actually issued in 1935." The only information we have on that is in the transcript itself.

Q. You have no information on that other than the transcript?

A. I have no information on that other than the transcript.

Q. Now taking sub-paragraph (a) paragraph A, what have you on that subject?

A. Well I have this information here (indicating).

Q. May I see it?

A. I checked this—"All memoranda, minutes and records."

Mr. Thompson: What do you mean by "The plans of the City of Indianapolis"?

Mr. Burns: I think that is fairly clear. If I can see the papers which he has brought, I think it will save a little time.

The Witness: "All memoranda". You brought up Todd's letter. I didn't have that because that is filed under the individual's name.

Mr. Burns: I am not finding fault because you didn't bring it.

A. The heading is so general. Down in here (indicating) these paragraphs (indicating) you will see where I checked it. This (indicating) has reference to the circular. Now with respect to "(b) Any proceeding, meeting, transaction, negotiation, conversation or correspondence in connection with the sale". Here is a copy of the prospectus which was furnished by the City—

Q. May I see that please?

A. —on which we based our preliminary information. (Handing document to counsel.)

Mr. Burns: Mark this P X 110.

(Said document was marked as requested P X 110.)

Mr. Burns: Q Mr. Simond, this paper which I have marked P X 110, containing 45 pages, is the statement pertaining to the proposed issue of Indianapolis Gas Plant Revenue Bonds which you just described as a prospectus, is that right?

A. Yes.

Q. And this was furnished to Halsey Stuart & Company by the City of Indianapolis?

A. It is furnished to any interested bidder interested in the bonds.

Q. This was furnished before the bid was made?

A. That is right.

Q. And do you remember, or is there anything shown in your records, just when you received this?

A. Not unless it is dated. Prior to the sale, that is all I can say, because our information is based on records of this sort.

Q. You relied upon this prospectus, as you describe it, P X 110, in making your bid for the bonds?

A. Not altogether; it was in part.

Q. But you relied in part upon that?

A. That is correct.

Q. And you had that at the time you made the bid which was accepted and resulted in the sale?

A. That is correct.

Q. From whom, if you recall, did you receive that?

A. From the city. Now who—

Q. Just who turned it over?

A. Who turned it over, I don't know.

Q. You don't recall?

A. I don't remember.

Q. Have you in your files any letter by which that was transmitted?

A. I haven't found any.

Q. Do you think it was probably handed to you or somebody in Indianapolis?

A. Yes.

Q. Have you another copy of this prospectus, or is that the only copy that you have?

A. Well I don't think it is material from our standpoint, because the transcript is all we would need, and so if you want it—

Q. Are you perfectly willing to have it marked and put in the deposition?

A. Yes, sir.

Q. Have you some other papers which you brought here in response to the subpoena?

A. Correspondence in reference to the circulars.

Q. May I see that?

A. We submitted them to the attorneys and to the engineers for their approval.

Q. May we see that correspondence, please?

A. (Witness hands papers to counsel.)

Q. Mr. Simond, I call your attention to three documents, marked respectively, P X 111, P X 112, and P X 113. Calling your attention to P X 111, is that a correct copy of a letter which you wrote to Thompson, Rabb & Stevenson, about June 27, 1935?

A. Yes, sir.

Q. And was that sent on or about its date?

A. On that date.

Q. And did you on the following day, June 28th, have a telephone conversation with Mr. Rabb in Indianapolis?

A. Yes, sir.

Q. Now with your letter, P X 111, to Thompson, Rabb & Stevenson, did you enclose a proof of the proposed circular which was issued July 1st?

A. Yes, sir.

Q. And is this the copy of the proof which you enclosed—P X 114?

A. Yes, sir.

Mr. Burns: I will ask to have this marked P X 114.

(Said document was marked as requested, P X 114.)

Mr. Burns: Q. Calling your attention again to P X 114, is this the copy of the proof as Mr. Rabb sent it back to you (indicating)?

A. Yes, sir.

Q. Can you tell us how many of the ink marks and changes that appear on that proof were made before it was sent to Mr. Rabb and how many were made by him?

A. I would say that the changes made in my writing were prepared prior to the submission to Mr. Rabb.

Q. And the changes in your writing—just so we will have this clear, suppose we mark the pages 1, 2, 3, and 4 respectively.

(Said pages were so marked by the Notary.)

Mr. Burns: Q. Now calling your attention to the change made in ink about the middle of page 2 by the insertion of the word "approximately", is that in your writing?

A. Yes, sir.

Q. And you would say that that was made prior to the time you sent it to Mr. Rabb?

A. Yes, sir.

Q. And calling your attention to the various changes in ink made on page 3 of P X 114, are all of those changes made on that page in your writing?

A. Yes, sir.

Q. And you would say that those changes were made prior to the submission of this proof to Mr. Rabb?

A. That is correct.

Q. And calling your attention to the underlining of the words "or sale or disposition of any part," appearing on page 4 of this circular; and calling your attention also particularly to Mr. Rabb's letter to you, do you know who made that underlining?

A. I would say Mr. Rabb. The changes I made were in ink. And he refers to it here: "As stated over the telephone and in our wire the words 'or sale or disposition of any part' in the third sentence of the next to the last paragraph of this circular should be eliminated." So he underscores here what should be eliminated.

Q. The words that should be eliminated. And calling your attention particularly to the pencil notations at the top of page 1, other than the marks made here by the reporter, are they your writing?

A. No, sir.

Q. Do you know whose they are?

A. They were signed by Mr. Rabb.

Q. That is all you know about it?

A. That is all I know, absolutely.

Q. Now as I understand it, this P X 114 was sent to Thompson, Rabb & Stevenson in your letter of which P X 111 is a copy, and was received back from Thompson, Rabb & Stevenson in P X 113, this letter from Albert L. Rabb to you, A. L. Rabb to you?

A. Yes, sir.

Q. And enclosed in the letter P X 113 was a confirmation of a telegram P X 112?

A. That is right.

Q. Now would you object to parting with the proof of the circular, P X 114?

A. No, sir, if we get it back.

Q. That is, you will let us take it long enough to photostat it?

A. Oh sure.

Q. And also the letters?

A. And the letters.

Q. Did you have any other correspondence with Thomp-

son, Rabb & Stevenson about this circular, or about anything in connection with these Indianapolis Gas Bonds?

A. Yes, with respect to the supplemental memorandum that we prepared, a copy of which you have entered as evidence.

Q. May I see that correspondence?

A. Yes, sir, (handing documents to counsel).

Q. Calling your attention, Mr. Simond, to the supplemental mimeographed memorandum dated September 28, 1935, which has been identified as P X 103, did you prepare that memorandum?

A. Yes, sir.

Q. And where did you secure the information from which that was prepared?

A. Well, it incorporated much of the stuff that was used in our original circular, from the prospectus and then from the City itself.

Q. When you say "prospectus" you are referring to P X 110?

A. Yes, sir.

Q. And when you were speaking of your original memorandum you were referring to P X 102?

A. That is right; and then discussions with the city with respect to the personnel of the Board of Directors and their affiliations.

Q. Now where did you get the information contained in that memorandum in regard to the city being engaged in negotiations with the Indianapolis Gas Company for a definite lease basis?

A. Where did we get that information?

Q. Yes.

A. From the city.

Q. From the city. In what form did you get that information?

A. Probably a conversation. There was a representative sent down for that purpose.

Q. There was a representative sent to Indianapolis?

A. Yes.

Q. Who was that representative?

A. I don't recall offhand.

Q. Do you know with whom he talked?

A. With whom he talked?

Q. Yes.

Mr. Sparks: How can he know that except by hearsay?

A. No.

Mr. Burns: Q. You do not?

A. Our correspondence as far as the city was concerned was with Mr. Rabb.

Q. Do you know what happened to the rest of this letter that appears to be torn off here, the letter of September 21, 1935?

A. No, sir.

Q. You don't know whether that letter was ever signed, or what was written on the bottom of it?

A. No, sir.

Q. Do you know when you received it, or whether it was signed when you received it, or anything of the sort?

A. I don't recall now.

Q. You don't recall anything at all?

A. I don't recall now.

Mr. Thompson: How could it be signed when it was received if it isn't signed now?

Mr. Burns: Part of it has been torn off. You can't tell whether it was signed or not. Half the page is torn off.

A. No, "Very truly."

Q. Isn't there half a page torn off that sheet?

A. Apparently a blank. I don't know.

Mr. Higgins: That has been torn off.

Mr. Burns: It is pretty plain that half the sheet has been torn off.

Mr. Thompson: Yes, and it is perfectly apparent the letter ends there too.

A. Occasionally we get letters that aren't signed, just sent out carelessly.

Mr. Burns: Q. You don't know what happened to the balance of that sheet that is torn off?

A. No, I have no idea.

Sometimes the boys pick up our mail before it is signed.

Q. Have you any more material that you brought here in response to the subpoena?

A. Well, the answers to some of those questions are in the transcript. I have indicated that.

Q. Yes, but have you any more material?

A. Here is an ordinance with the letter of transmission of Matson, Ross, McCord and Clifford with respect to it (handing document to counsel).

Q. Did you bring with you the Mullergren report, Mr. Simond?

A. A photostatic copy. That is what we seemed to have in our files.

Q. Do you know where the original is?

A. Mr. Eaton may have it; I am not sure.

Q. Mr. Eaton of Otis & Company in Cleveland?

A. Yes.

Q. Or Mr. Daily, the president of Otis & Company?

A. Yes.

Q. Did you receive this report from Mr. Mullergren on or about the date shown there, June 22, 1935?

A. Yes, approximately that date.

Q. Did you have anything to do with engaging Mr. Mullergren?

A. No.

Q. Who did engage him, if you know?

A. I don't know; whether Mr. Eaton did or Mr. Schroeder did, I don't know.

Mr. Thompson: Q. Who is Mr. Schroeder?

A. Schroeder is one of our corporation buying department men.

Mr. Burns: Q. But you personally didn't have anything to do with engaging him?

A. No, sir.

Q. This report of Mr. Mullergren's was part of the information upon which you relied in the purchase of these securities of the Indianapolis Gas Plant and in making up the circular, P X 102?

A. That is right.

Mr. Thompson: How could he have relied on that report in purchasing bonds which were bought on May 28th when the report is dated in June?

Mr. Burns: Q. How much earlier than the date of this report was Mr. Mullergren engaged, do you know?

A. I don't recall, Mr. Burns. I know he made a verbal report to us, and then reduced it to this form.

Q. Did he make this verbal report to you before you made your bid to the City of Indianapolis?

A. That I don't know.

Q. Well if he didn't you would want to correct—

A. Before we made our purchase?

Q. Before you made your purchase.

A. Well I know he was familiar with that situation down there, and we discussed it with him, and he made his examination prior to the sale, and then—or, I will put it this way, he went over with us an examination he had made previously, and then at the request of Otis and ourselves brought that report up to date.

Q. And this preliminary discussion that you had with him was before you made your bid for the bonds?

A. That is right.

Q. And did you personally have that discussion with him?

A. I sat in on it. I wasn't alone.

Q. You weren't alone. Do you recall who else was there?

A. I don't recall definitely. I know who probably would be there.

Q. But you don't at this time have any definite recollection?

A. No, I don't.

Q. Except that you and Mr. Mullergren were there?

A. That is right.

Q. And that it was before you submitted your bid in the latter part of May, 1935?

A. Yes.

Q. Now in connection with this preliminary conference that you had in May, 1935, was there some discussion of the lease from the Indianapolis Gas Company to the Citizens Gas Company of the Indianapolis gas property?

Mr. Thompson: With whom?

Mr. Burns: Was there some discussion between Mr. Mullergren and Mr. Simond?

A. Not between us.

Q. Was anything said about the lease?

A. Well, I don't recall, because I wasn't alone in that discussion, you see. We knew of the lease.

Q. You knew of the lease?

A. We knew of the lease.

Q. Was anything said in that conversation about the lease?

A. With Mr. Mullergren?

Q. Yes, with Mr. Mullergren.

A. That I don't know.

Q. You don't know whether anybody mentioned anything about the lease?

A. To Mr. Mullergren? No, I don't know.

Q. Or to anybody else that was present there at the conversation?

A. I don't know.

Q. To whom were copies of this report of Mr. Mullergren's furnished?

A. Otis & Company and ourselves.

Q. Did you furnish copies to anybody else?

A. We may have in some instances where we were requested.

Q. Did you furnish a copy to the City of Indianapolis?

A. We didn't.

Q. Do you know whether anybody did?

A. I don't know.

Q. You don't know whether Mr. Mullergren did?

A. I don't know.

Q. Or whether Otis & Company did?

A. I doubt if Mr. Mullergren would because he was, for this occasion, in our employ. Whether Otis & Company did, I don't know.

Q. Is this the only report which you received from Mr. Mullergren?

A. No, there was a previous report. That was not our property.

Q. Did you receive that from him, receive copies from him?

A. No, sir.

Q. You received it from somebody else?

A. Otis & Company.

Q. Do you have a copy of that?

A. No, sir.

Q. Have you ever had a copy of it?

A. We had it in our possession. It was on the basis of that that we had our preliminary discussion with Mr. Mullergren, and that was a report which he brought down to date in this showing.

Q. Do you know when that previous report had been made by Mr. Mullergren?

A. No, sir. It was not made for us. I don't know when it was made.

Q. Now calling your attention particularly, Mr. Simond, to a statement appearing—the pages don't seem to be numbered—at the bottom of a page headed in caps "Leasehold"; calling your particular attention to the words "The lease in our opinion is a very favorable one for the Citizens Gas Company." In the conference that you had with Mr. Mullergren prior to your purchase of the bonds, was that opinion, or the substance of that opinion expressed by Mr. Mullergren?

Mr. Thompson: To which question the defendants, City of Indianapolis, and the individuals who are members of the Board of Trustees and Directors of the City of Indianapolis object, because this is purely hearsay as to them. This is a conversation between representatives of Otis &

Company and Halsey Stuart & Company, and is self-serving; the declarations would be self-serving, and could in no possible way bind the city.

Mr. Sparks: The Citizens Gas Company object for all those reasons, and for the further reason that that question or substantially that question has been asked and answered at least two or three times before.

Mr. Burns: Now will you read the question, please.

(Question read.)

A. Our discussion was primarily on the physical structure and situation. We didn't have anything to do with the lease as a legal matter.

Q. When you say the physical structure, was that the physical structure of the owned property or the leased property, or both?

A. All.

Q. All the property including the leased property?

A. Yes, sir.

Q. And that is what you were discussing with Mr. Mullergren?

A. That is right.

Mr. Burns: I would like to have this Mullergren report, or the photostatic copy of it furnished by Mr. Simond, marked P X 115.

(Said document was marked as requested, P X 115.)

Mr. Burns: Now we would like to get this long enough to make a copy of it, if we may, if that is all right.

Q. Did you bring something else with you in response to the subpoena?

A. A memorandum here with respect to the lease, a legal document, in order to determine the scope, discretion and authority that the Board of Directors may exercise in taking over the gas property.

Mr. Thompson: Who prepared that memorandum?

A. Mr. Matson.

Mr. Burns: It has no date. Do you recall when you received this memorandum from Messrs. Matson, Ross, McCord & Clifford?

A. No, I don't, Mr. Burns.

Q. Have you had an opportunity to check on that Newton Todd letter, Mr. Simond?

A. Yes, sir.

Q. Calling your attention again to P X 109, the photostat of a carbon copy from Newton Todd to Halsey Stuart, dated December 4, 1936, have you now found the original of that letter from Mr. Todd in your file?

A. Yes, sir.

Q. And this is a correct photostat of that letter?

A. A correct copy.

Q. Have you also found the carbon copy of your letter to Mr. Todd of December 7th?

A. Yes, sir.

Q. And that serves to confirm your former statement that Plaintiff's Exhibit 108 was a letter that you wrote to Mr. Todd?

A. That is correct.

Q. Does that letter show what you enclosed with it, in any other way than the original letter shows?

A. No, nothing further.

Q. Have you brought with you, Mr. Simond, all of the correspondence between your office and the office of Thompson, Rabb & Stevenson, or anyone representing the City of Indianapolis?

A. To my knowledge I have.

Q. You have caused a search to be made of your files to locate that correspondence?

A. Yes. I was just thinking a moment ago that they sent us copies of the reports showing earnings and so forth, which I neglected to bring.

Q. Did you ascertain over the phone on what days and in what papers those various advertisements were published?

A. They are preparing that.

Q. They are preparing that?

A. That is right.

Mr. Burns: You may cross examine.

Mr. Thompson: Will you identify this as Defendant City's Exhibit No. 1.

(Said document was marked as requested, Defendant City's Exhibit No. 1.)

Cross-Examination by Mr. Thompson.

Q. Mr. Simond, I hand you now a memorandum which has been identified as City's Exhibit 1 and ask you whether that is a memorandum which you received from your attorneys, Matson, Ross, McCord & Clifford?

A. That is right.

Q. And this Exhibit No. 1, City's Exhibit No. 1, was produced here this morning at the request of the plaintiffs in response to the subpoena duces tecum that had been served upon you?

A. That is correct.

Q. Now you don't know at the present time just when you received this opinion which is identified as City's Exhibit No. 1?

A. No, sir.

Q. Who was the particular member of the firm of Matson, Ross, McCord & Clifford with whom you dealt?

A. Mr. Matson.

Q. Mr. Frederick E. Matson, who is the senior member of the firm?

A. Yes.

Q. And he is a man that has had a long and intimate connection with the problems arising out of the gas properties at Indianapolis?

A. Yes.

Q. He has been connected for the William Eaton Estate in litigation in the Federal Court respecting the validity of this public charitable trust?

A. I don't know that.

Q. Now I call your attention—naturally when you received this opinion of course it was given careful attention by the firm of Halsey Stuart & Company?

A. Yes, sir.

Q. So that from whatever date it was received you were aware that in the opinion of your counsel the following was true—and I read from page 13:

“The exact situation on the lease must depend on true meaning of the terms in the franchise contract, and in those provisions in the Articles of Incorporation of the Company out of which a public charitable trust arose. Did the Board of Public Works and the Common Council, when granting the franchise in 1905 and reserving therein the right to take over ‘plant and property’ on payment of a minimum cost, have in mind or contemplate that when such time came there would be found in the ‘plant and property’ of the gas company a 99 year lease on other utility property greater in extent than its own, the annual rental charge for which would be nearly half a million dollars? Or, if the creation of a public charitable trust, to arise out of terms under which stockholders of the Company were to invest their money under its Articles of Incorporation, was specifically contemplated, did the Common Council, in adopting the ordinance approving the franchise contract, which was its only action ‘to receive’ the trust and ‘to agree to conditions and terms accompanying the same and binding the corporation (the

City) to carry them out', contemplate or intend the trust res should ever include a lease with such burdens and obligations as the lease here involved?

"The answer to these questions would seem to be clearly and positively in the negative. It is inconceivable that the Board of Public Works, the Common Council, and the public spirited citizens of the City who promoted the enterprise, could at that time have had any such thing in mind. No such intention is expressed in the franchise contract, nor can any such intention fairly be implied therefrom."

Now that closes the quote for the present. Now you are familiar with that part of Mr. Matson's opinion?

A. Yes.

Mr. Burns: Just a minute. I would like to object to that as wholly irrelevant and immaterial, which is a mere speculation on the part of Mr. Matson. A copy of the opinion from an attorney to his client is privileged and otherwise objectionable.

Mr. Thompson: You caused it to be produced. You subpoenaed it. You can't subpoena something and then claim it is privileged.

Mr. Burns: I didn't subpoena that, as a matter of fact.

Mr. Thompson: You subpoenaed everything you could lay your hands on.

Mr. Burns: I didn't subpoena anything from Matson, Ross, McCord & Clifford.

Mr. Thompson: Q. In all your dealings—and when I say you, I mean Halsey Stuart & Company's dealings—after this opinion from Mr. Matson, you dealt with this proposition on the theory that this leased property was not a part of the trust res?

Mr. Burns: I object. That assumes he knows.

A. Of the trust what?

Mr. Thompson: Q. Of the trust res; that is to say, the trust property of the Citizens Gas Company that was being taken over by the City of Indianapolis, is that true?

A. That is true, but I don't know how many talks we had with Mr. Matson afterwards. I don't know when we received that.

Q. I understand that. I am going to find out from Mr. Matson what the date of this opinion was. Now Halsey Stuart & Company were interested jointly with Otis & Company in purchasing these Gas Plant Revenue Bonds?

A. Yes.

Q. And you made a joint bid for these bonds to the City of Indianapolis on the 28th day of May, 1935?

A. In response to advertised sale.

Q. And your bid was accepted on the following day, May 29, 1935?

A. Yes.

Q. Now when were these bonds physically delivered to you by the City and when did you pay the consideration for them?

A. Either on or subsequent to July 1st.

Q. Wasn't the payment made—

Mr. Burns: June 27th.

Mr. Thompson: Q. —June 27th?

A. That is right.

Q. Now between the date when your bid had been accepted and the date when the bonds were delivered, Mr. Simond, did you come to Indianapolis with Mr. Cyrus Eaton of Otis & Company and have an interview with me and with Mr. Broadhurst Elsey, who was then the Treasurer of the Board of Trustees for Utilities, City of Indianapolis?

A. Was that before or after sale?

Q. I say, after you had purchased the bonds but before you had issued this circular of July 1st, which is marked P X 102?

A. After we bought the bonds did we go to Indianapolis?

Q. Yes, and have a conversation with me, Mr. Elsey and Mr. Cyrus Eaton?

A. I don't recall whether it was before or after, Mr. Thompson.

Q. Well you remember that you did have a conversation with Mr. Elsey and me in connection with the City of Indianapolis participating in or becoming responsible for the bond circular which you and Otis & Company were to issue?

A. I am sorry. Will you repeat that question again?

Q. What I am asking you is this; that after you and Otis & Company had made this joint bid, and your bid had been accepted, and before you issued this circular that was dated July 1st, if it isn't a fact that you came to the City of Indianapolis and had a conference in my office at which was present yourself, Mr. Cyrus Eaton of Otis & Company, Mr. Broadhurst Elsey, who was then the treasurer of the Board of Directors for the Utilities district and myself?

A. With respect to the circular?

Q. Yes, sir. And to the City of Indianapolis participating in such a circular?

A. What do you mean by participating in the issuance of it?

Q. I will ask you if you didn't request the Board of Directors for Utilities to join with Otis & Company and your firm, Halsey Stuart & Company, in the issuance of this bond circular?

A. No, sir, we asked for the approval.

Q. You asked us to approve it?

A. That is right.

Q. And that conversation was held in my office, wasn't it, with the people present whom I have just indicated?

A. It was in your firm's offices, yes, sir.

Q. Now I will ask you if it isn't a fact that I told you at that time, in the presence of Mr. Eaton and in the presence of Mr. Elsey, that the only statutory authority which the Board of Directors for Utilities had was to make this offering of the bonds, and that the Board would not join in or approve the issuance of any circular whatever; that that was a matter that was entirely up to the people who had purchased the bonds?

A. That is right.

Q. So that when this circular was issued and when this correspondence was had with Mr. Rabb, you knew at that time that the only competent authority, that is, the Board of Directors for Utilities of the City of Indianapolis had declined your express request to approve any circular which the underwriter of these bonds would put out?

A. I don't know whether it was a declination or not. I know they said that Mr. Rabb, as attorney for the city, it seems to me would approve a circular.

Q. Didn't Mr. Elsey tell you and didn't I tell you there that the city would have nothing to do with the approval of any bond circular?

A. That the city nor you would have anything to do with it?

Q. Yes, sir, that the city would have nothing to do with the approval of a bond circular; that it had sold revenue bonds, had exercised its statutory authority, and that it would have nothing to do with the approval of the circular?

A. That may be true.

Mr. Burns: You don't recall it?

Mr. Thompson: Now wait a minute, Mr. Burns; I am cross-examining.

Q. Is that your recollection of that conversation?

A. I am frank to say I don't recall all the details of that.

Q. Don't you recall that you asked our firm to give an opinion as to the non-taxability, for income tax purposes, of these revenue bonds?

A. Asked your firm to give an opinion?

Q. Yes, in that same conference.

A. They may have, because we were getting it from Matson, and the city was getting your opinion.

Q. And if I didn't tell you in that same conference, emphasizing again that the city would have nothing to do with your re-sale of these bonds; that all that the city would do through our firm, as counsel, would be to give an opinion as to the legality of this issue, and that it declined to join in any opinion as to the non-taxability of these bonds, the income on these bonds, isn't that true, Mr. Simond?

A. I know we had your opinion on tax exemption.

Q. I know, but don't you recall that conversation?

A. No, I am sorry, I don't.

Q. You wouldn't say it didn't occur, will you?

A. I don't say it didn't occur at all.

Q. You do know that you requested in that conference that the city approve these bonds and that I told you that it would not approve them, and that Mr. Elsey told you that—I mean this bond circular?

A. You mean the bond circular?

Q. Yes.

A. Yes, I recall that.

Q. And when you wrote to Mr. Rabb, or to our firm—let me have these exhibits here—I call your attention to your letter of June 27th, which has been identified as P X 111. You wrote to us individually; you didn't even address us as attorneys for the Utility District or for the City of Indianapolis, did you?

A. No, sir.

Q. And that was because, wasn't it, Mr. Simond, of this prior conference that we had had with you, at which we said we would not approve the circular for the City of Indianapolis and there emphasized that, that is right, isn't it?

A. That is right.

Q. And I call your attention also to P X 113, in which Mr. Rabb answered your letter and said, "As to the remainder of the circular we have no comment". You un-

derstood when you got that, that that was merely in line with what I had told you in the prior conference, that the city would have no part in the approval of this circular?

A. That is right.

Q. Now you produced certain other papers here this morning at Mr. Burn's request which he did not have identified as exhibits; that is right, isn't it—these papers that I have here before me now: a letter from Thompson, Rabb & Stevenson to Halsey Stuart & Company under date of September 25th; copy of a letter from Halsey Stuart & Company to Mr. Rabb under date of September 23, 1935, and an original from Mr. Rabb to yourself, or I will say from Mr. Rabb—it is on our letterhead, Thompson, Rabb & Stevenson, to yourself, on September 21, 1935; and also a letter from yourself to Mr. Albert Rabb under date of September 18, 1935.

A. Yes, sir.

Mr. Thompson: I will have these identified as City's Exhibits 2, 3, 3-A, 4, 4-A, and 5, respectively.

(Said documents were marked as requested, City's Exhibits 2, 3, 3-A, 4, 4-A, and 5, respectively.)

Mr. Thompson: Q. I will ask you first to state for the record whether that correspondence was produced by you this morning in response to the subpoena duces tecum that had been served upon you?

A. That is correct.

Q. I call your attention particularly to City's Exhibit No. 4, which is a letter on the letterhead of Thomson, Rabb & Stevenson, dated September 21, 1935, and ask you whether that letter, which is unsigned, apparently, was received by you in due course of mail from our firm probably on the 22nd or 23rd day of September?

A. I would say so. We acknowledged their letter of September 21st.

Q. And when in accordance with page 2 of this letter, Mr. Rabb wrote you as follows: "We make no comment on the other facts stated in the proposed circular, as to most of which we have no personal knowledge; and hence do not discuss," you understood also that that was in accordance with the former conversation which Mr. Elsey and I had had with you, that the city would not approve these circulars?

A. That is correct.

Q. Now your attention has been directed to certain newspaper advertisements which have been identified as P X 104 and P X 105. Those circulars were prepared by

Halsey Stuart & Company—I mean those advertisements were prepared by Halsey Stuart & Company?

A. That is right.

Q. On their own initiative?

A. That is right.

Q. Without the assistance of anyone else except members of your own firm and Otis & Company?

A. Or possibly our advertising counsel and advertising agency.

Q. And were published individually and on your own responsibility in the newspapers?

A. Yes, sir.

Q. Now your attention has also been directed to a prospectus issued by the City which has been identified as P X 110. That is a prospectus that went to bidders for these Gas Plant Revenue Bonds?

A. Yes.

Q. You did not furnish that prospectus to any purchaser of these bonds, did you; I mean, purchaser from you?

A. I don't think so.

Q. All that you furnished to any purchaser of these Utility bonds was either the bond circular identified as P X 102 or possibly the bond circular P X 103, and the advertisements?

A. Yes.

Q. Plus the opinion of counsel if they asked for it?

A. That is correct.

Q. Now in the issuing of these circulars and the publication of these advertisements, Halsey Stuart & Company and Otis & Company were engaged in the sale of Gas Plant Revenue Bonds issued by the City of Indianapolis, is that true?

A. That is right.

Q. And these advertisements were published and these circulars were issued, were they not, Mr. Simond, for the purpose of inducing people to buy Gas Plant Revenue Bonds?

A. Yes.

Q. You had no Indianapolis Gas Company bonds for sale, did you? I am not talking about—

A. The 5% bonds?

Q. That is right?

A. No, sir.

Q. Did you ever make any representations to anyone on the basis of these circulars or these advertisements to

purchase from you the Indianapolis Gas Company 5's gold bonds?

A. Did our organization?

Q. Yes, on the basis of these circulars?

A. I can't answer that. I don't know how to answer that.

Q. What I am getting at, Mr. Simond,—maybe I haven't made myself very clear—all this information which you have produced here this morning, and all that has gone into—or been identified during the course of this deposition, was information which was acquired to the extent you have described by Halsey Stuart & Company and Otis & Company, who between them purchased Utility District Revenue Bonds?

A. That is right.

Q. And not Indianapolis Gas bonds?

A. That is right.

Q. You knew, of course, in the making of these purchases that you were dealing with a municipal corporation?

A. Yes, sir.

Q. Whose powers were strictly limited by statute?

A. Yes, sir.

Q. And you knew that anyone dealing with any officer, attorney or employee of the Indianapolis Gas Company, unless he had express statutory power, he was without authority to bind the city?

A. That is right.

Mr. Thompson: I have nothing more.

Redirect Examination by Mr. Burns.

Q. Mr. Simond, you said that the newspaper advertising which appeared in various papers, and was identified as P X 104 and P X 105, was prepared by Halsey Stuart & Company and Otis & Company and your advertising counsel, is that right?

A. Or agency.

Q. Or agency?

A. Rather agency than counsel.

Q. But in the preparation of that advertising material you relied, among other things, upon the prospectus, P X 110, that had been furnished to you by the city?

A. No, they relied on the circular for that.

Q. The circular was prepared in reliance upon the statements appearing in the prospectus, among other things?

A. In part, yes, among other things, that is right.

Q. Now calling your attention particularly to the language appearing on page 5 of the circular, or the prospectus, P X 110, "The lease is for a term of 99 years from October 1, 1913," and so forth; were you familiar with that language at the time the circular was prepared?

A. Yes, sir.

Q. You said in answer to a question by Mr. Thompson that from the time that you received the opinion of Matson, Ross, McCord & Clifford, identified as Defendant City's Exhibit 1, you proceeded upon the assumption that the lease of the Indianapolis Gas—the Citizens Gas Company was not a part of the property which the city was leasing, is that right?

A. Well I think we proceeded on that basis prior to that, because when they took over the property it seemed to me the showings indicated that they were taking title to certain properties not leased properties. They couldn't take title to a leased property.

Q. Well, whether they were taking an assignment of the lease, do you know approximately when that opinion was received from Matson, Ross, McCord & Clifford?

A. No, I am sorry, I don't.

Q. Was it received during the year 1935?

A. I don't recall.

Q. You don't know whether it was in 1935 or 1936?

A. No.

Q. Can you tell whether it was received before or after you issued this circular P X 102?

A. After.

Q. After?

A. That is right.

Q. Do you know how long after?

A. No.

Q. You don't know whether it was a month after or a year after?

A. No, or a year and a half or two years after.

Q. But you know it was not received until after you had issued the circular, P X 102?

A. I can't say, I don't know. I will have to say I don't think so. I don't know the date of that.

Q. Now calling your attention again to P X 111, and particularly to the second paragraph, in which you say: "While I appreciate that you cannot substantiate perhaps the figures which our engineers obtained for us, it would be very helpful if you would give us your approval of the circular, insofar as you are able."

A. That is right.

Q. That you wrote to Mr. Rabb and the only suggestions that you got from him about the circular were those contained in P X 112 and P X 113, is that correct?

A. That is correct.

Q. And when you wrote Mr. Rabb you knew that the firm of Thompson, Rabb & Stevenson represented the city in this matter, didn't you?

A. That is right.

Q. And you were writing them because they did represent the city?

A. Yes, we wrote Matson, we wrote the engineers and we wrote Mr. Rabb.

Q. You mean you wrote Matson in regard to the circular?

A. That is right.

Q. Have you got a copy of that letter here?

A. It was attached to those showings.

Q. No, Mr. Mullergren's letter. You haven't produced any letter from Matson in regard to the circular?

A. I thought I had it there. We got all three.

Q. But your recollection is that you did submit the circular to Matson, Ross, McCord & Clifford?

A. That is right.

Q. And did they approve the circular as issued by you?

A. I don't recall. The final circular incorporated the suggestions of all three. Now whether the preliminary copy we sent to Mr. Matson came back with changes or corrections on I don't recall now.

Q. But the circular as issued, P X 102, incorporated whatever suggestions Mr. Matson had to make about it?

A. That is right.

Q. And he approved it in its final form?

A. That is right.

Mr. Burns: We offer as part of the deposition—

Mr. Thompson: Pardon me, Mr. Burns, I want to ask one question about this, if you don't mind.

Mr. Burns: That is all right.

Mr. Thompson: Q. P X 115 is a report and appraisal dated June 22, 1935, made to Halsey Stuart & Company and Otis & Company by Arthur L. Mullergren, consulting engineer, of Kansas City, Missouri?

A. Yes, sir.

Q. Mr. Mullergren was employed by Halsey Stuart & Company and Otis & Company for the purpose of making this report?

A. Yes.

Q. He was not employed by the City of Indianapolis in any way?

A. No, sir.

Mr. Burns: I offer in connection with the deposition of Mr. Simond, P X 101 to P X 115, both inclusive. It is understood, however, that P X 106 will not be transmitted with the deposition, and will be later attached if it is found that it is impossible to locate a copy of it in Indianapolis, is that correct? Is that satisfactory?

Mr. Thompson: Yes, we have already stipulated it twice, Mr. Burns.

The defendant, the City of Indianapolis, and the individual defendants who are members of the Board of Directors and Board of Trustees of the Department of Utilities of the City of Indianapolis object to the admissibility in evidence of each of said exhibits, identified as P X 101, P X 102, P X 103, P X 104, P X 105, P X 107, P X 108, P X 109, P X 110, P X 111, P X 112, P X 113, P X 114, and P X 115, for each of the following reasons: First. A city cannot be estopped expressly. It follows it cannot be estopped impliedly or in a quasi manner. Furthermore such circular has no probative force since it would not tend to prove or disprove any of the issues in this case.

Second. Such admission to be admissible must be an admission of fact. In the instant case to have probative value it would have to be one of law, namely that the lease was valid.

Third. Such admission must be sufficiently certain without the aid of a forced or strained construction to bear out the interpretations placed on it. In the instant case it is not possible even by the most tortured construction of the language of the circular to put any words in the mouth of the city respecting the validity of this lease.

Fifth. The admission must have been made by a person having knowledge. This prospectus at the bottom of the front page recites: "The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935."

Sixth. Since the City of Indianapolis is the party against whom this prospectus is being offered in evidence, it must be shown that the statement was made, or the prospectus written, authorized or ratified by someone

having the legal right and power to do so and that such statement was made or such prospectus written, authorized or ratified within the scope of such authority. No one in this case had that authority with the possible exception, (which is not conceded) of the Board of Directors for Utilities and unless it can be shown that they had such authority and did in a proper legal manner either write, authorize or ratify the prospectus, it is not admissible in evidence.

Seventh. The entire prospectus is irrelevant and immaterial to the issues in this cause for the reason that there is nothing in such prospectus relating to any statement by the City of Indianapolis in respect to the validity of such lease. It is not shown who issued the prospectus since no signatures appear on it, nor is there any indication as to who the author or publisher is.

Eighth. As to the City of Indianapolis the prospectus is pure hearsay as is borne out by the many statements on its face.

Ninth. There can be no showing that plaintiffs relied on this prospectus for revenue bonds in their purchase of Indianapolis Gas Company bonds.

Tenth. There has been no showing that the lease is binding on or enforceable against the City; no showing that the City was a party to the lease, an assignee of the lease, or obligated to accept an assignment thereof or obligated by reason of recognition or adoption of the lease.

(Said Exhibit marked P X 101 to P X 115, both inclusive, except P X 106, are attached to this deposition and made a part hereof.)

Mr. Thompson: The defendant, City of Indianapolis, and the defendants individually who are members of the Board of Directors and Board of Trustees of the Department of Utilities, now offer in evidence City's Exhibits 1 to 5, both inclusive, identified by me in the course of the cross-examination of this witness.

Mr. Burns: The plaintiffs object to these exhibits. To Defendant City's Exhibit 1 on the ground that it is wholly irrelevant, incompetent and immaterial. It is the printed opinion of counsel to a client. It was not subpoenaed by the plaintiffs in this case, and it represents merely the conclusions of fact or conclusions of law which are wholly immaterial.

Plaintiffs object to City's Exhibits 2, 3, 4, and 5, as merely self-serving declarations of the City or its counsel,

which are not admissible against either the bondholders or the trustees of the bonds issued.

(Said City's Exhibits 1 to 5, both inclusive, are attached to this deposition and made a part hereof.)

Mr. Burns: I am not sure whether I understood you, Mr. Simond, that you didn't want this prospectus back, or is that wrong? You do want it back, do you?

A. I would like to have all these things back.

Mr. Burns: In that case I will offer in evidence only the cover which is marked by the stenographer and the first 13 pages of Exhibit 110. The remaining parts of the transcript, covering pages 14 to 45, inclusive, are merely copies of the Indiana Statutes, and I think there is no use of having those copies included in the deposition, so I will instruct the stenographer to include only the cover and pages 1 to 13, inclusive.

Mr. Thompson: I will object to any partial offer of the instrument. It has to be interpreted and construed together.

In accordance with the stipulation made by counsel during the course of taking the depositions, Mr. Simond, the witness, furnished to the reporter a list of the papers in which the two advertisements, marked P X 104 and P X 105, appeared. Such a list with a copy of the advertisements is attached hereto, marked P X 116, P X 116-A, and P X 116-B.

By stipulation of counsel for the respective parties the signature of the witness to the foregoing deposition was waived.

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“(Certificate of notary to deposition omitted in printing.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 101.

P X 101. W. C. M.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America To R. E. Simond, 201 South LaSalle Street, Chicago, Illinois, Harold L. Stuart, 201 South LaSalle Street, Chicago, Illinois, and Halsey Stuart & Co., Inc., 201 South LaSalle Street, Chicago, Illinois—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before William C. Meyer, a Notary Public in and for said District, on the 21st day of February, A. D. 1939, at 10 o'clock in the forenoon and so on from day to day until your respective depositions are completed at Room 2360, The Field Building, 135 South LaSalle St., in Chicago, Illinois in said District, to testify and give evidence in a certain cause now pending and undetermined in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, wherein The Chase National Bank of The City of New York, Trustee Citizens Gas Company of Indianapolis, The Indianapolis Gas Company, is Plaintiff and The City of Indianapolis, Board of Trustees for Utilities of The City of Indianapolis, and Board of Directors for Utilities of The City of Indianapolis, are Defendants, on the part of the said Plaintiff. And that each of you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, the following:

A. All memoranda, minutes and records of every kind, in the possession of Halsey, Stuart & Co. Inc., which discuss or make any reference to:

(a) The City of Indianapolis Gas Plant Revenue Bonds which the City of Indianapolis expected to issue or actually issued in 1935;

(b) Any proceeding, meeting, transaction, negotiation, conversation or correspondence in connection with the sale of, or efforts to sell, by the City of Indianapolis, Gas Plant Revenue Bonds issued by said City;

(c) The use which the City of Indianapolis expected to

make of the proceeds of the sale of the Gas Plant Revenue Bonds it expected to issue or actually issued in 1935;

(d) The plans of the City of Indianapolis in respect of its acquisition of the properties of Citizens Gas Company of Indianapolis;

(e) The plans of the City of Indianapolis in respect of its activities in supplying the inhabitants of the City with gas;

(f) The plans of the City of Indianapolis in respect of its control, ownership or operation of gas producing or distributing properties after its acquisition of the properties of said Citizens Gas Company;

(g) Any advertisement of the City of Indianapolis Gas Plant Revenue Bonds, whether by prospectus, advertising circular, newspaper advertisement, magazine advertisement, or otherwise, or any of the contents of any such advertisement;

(h) The lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913, or any provision of said lease; or

(i) The property covered by the lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913.

B. All correspondence and copies of correspondence between the City of Indianapolis, or any of its officers, agents, employees or attorneys, and Halsey, Stuart & Co. Inc., or any of its officers, agents, employees or attorneys, which discusses or makes any reference to any one or more of the various matters or things referred to above in sub-paragraphs (a) to (i) inclusive of paragraph A above.

C. Any and all advertising circulars, newspaper advertisements, or other advertising or publicity material of any sort, used by Halsey, Stuart & Co. Inc. or Otis & Co. Inc., or both of them, during the year 1935 in connection with the sale or offering for sale of the City of Indianapolis, Indiana, Gas Plant Revenue 4½% Bonds.

D. Any and all reports or letters from Arthur L. Mullergren, Consulting Engineer, to Halsey, Stuart & Co., Inc. and Otis & Co. Inc., or either of them, during the year 1935 in regard to an appraisal or valuation of the property of the Citizens Gas Company of Indianapolis, or the property of The Indianapolis Gas Company, or the leasehold created by the lease of September 30, 1913, from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis.

together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause; and for a failure to attend and do as above directed you will be deemed guilty of contempt of Court and liable to pay all loss and damages sustained thereby to the party aggrieved.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Hon. James H. Wilkerson, Judge of the said Court, at Chicago, in said District, this 15th day of February, in the year of our Lord one thousand nine hundred and 39, and of the Independence of the United States of America the 163rd year.

(Signed) Hoyt King,
Clerk.

(Seal)

Endorsed: Equity No. 1844. Proceedings pending in the District Court of the United States for the Southern District of Indiana, Indianapolis Division. The Chase National Bank of The City of New York, Trustee, vs. Citizens Gas Company of Indianapolis, The Indianapolis Gas Company, The City of Indianapolis, Board of Trustees for Utilities of The City of Indianapolis, and Board of Directors for Utilities of The City of Indianapolis. Subpoena Duces Tecum. Checked.

* * * * * 102 * * *

“(Plaintiffs’ Deposition Exhibit ~~40~~ is identical with Exhibit B attached to the Answer and Counter-Claim of the City of Indianapolis, et al. (I R. 192-199).)”

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 103.

P X 103. W. C. M.

Re: City of Indianapolis, Indiana

Gas Plant Revenue

4½% Bonds

Acquisition of Gas Properties

As indicated in the descriptive circular, this issue was for the purpose, among other things, of providing funds for the City to exercise its franchise rights to acquire the properties of Citizens Gas Company, a privately owned company which was incorporated under the Laws of Indiana in 1906, and since 1913 has had control of the entire gas business in the City of Indianapolis and its environs. In this connection, it should be noted that such acquisition by the City was a logical outcome of the relationship of Citizens Gas Company to the City. The Articles of Incorporation of Citizens Gas Company as amended August 21, 1921, provided in effect that its common stock should be under the control of a board of self-perpetuating trustees who should hold and vote the stock and issue Certificates of Beneficial Interest to the subscribers to Capital Stock and that "it shall be the duty of the Trustees and Directors of the Company to convey the gas plant and property belonging to the Company to the City of Indianapolis" upon payment or assumption of all outstanding obligations, retirement of preferred and common stock at its face value plus accrued dividends. A similar provision was contained in the franchise of Citizens Gas Company. It has been established by the Courts that this franchise was not a purchase or contract to purchase by the City but created a public charitable trust in the Company's properties with the obligation on the part of the Company to transfer the property to the City when the Company's Capital Stock was retired. This set of circumstances explains the reason why the City was able to acquire properties with an appraised depreciated physical value in excess of \$13,000,000 for a consideration of approximately \$6,500,000.

A change in ownership always suggests the possibility

of a change in personnel. This fact undoubtedly caused uncertainty in the minds of the management of the Company, which probably made it less aggressive in its sales methods than it would have been under other circumstances. Furthermore, the amount the Company could earn and distribute on its Certificates of Beneficial Interest was limited to 10%. Accordingly, it is believed that the management was content to operate the properties at a volume simply sufficient to meet all of the Company's obligations and to provide a substantial amount for additions and retirements. In this connection independent engineers state in their report.

"* * * we find that the Company does not have as large a percentage of the potential business as we feel is obtainable. There have been no campaigns in the last several years for water-heating and house-heating business and as a result the revenues of the Company are not up to their potential possibilities. It is our opinion that a rearrangement of the rate schedule and an aggressive new business campaign will result in an additional volume of profitable business."

Value of Properties

The ultra-conservative policy followed by the management of providing for additions and improvements out of earnings and charging a very large amount of depreciation is reflected in the property account of \$9,577,280 as shown on the books of the Company as of April 30, 1935, as compared with the depreciated physical value of \$13,431,000 as appraised by independent engineers as of January 1, 1935.

.

The information contained herein has been carefully compiled from sources considered reliable, and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

9-28-35

PLAINTIFFS' DEPOSITION EXHIBIT 104.

Photostat from Indianapolis Times, July 1, 1935, Home Edition, page 11.

Exempt from all present Federal Income Taxation. Tax exempt in the State of Indiana.

\$8,000,000

City of Indianapolis, Indiana

Gas Plant Revenue 4½% Bonds

Due serially in varying amounts from June 1, 1938 to 1967

Authorization: Under a resolution adopted May 7, 1935, by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds to exercise its franchise rights to acquire the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

Security: These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and/or operated by said City and payable solely and exclusively out of such income and revenues.

Covenants: Under said resolution adopted May 7, 1935, the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation, a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the

City agrees that there will be credited in this manner to such bond and interest fund not less than \$360,000 annually in the years 1936 and 1937; \$450,000 annually in the years 1938 to 1940, both inclusive; \$500,000 annually in the years 1941 to 1967, both inclusive.

History: We are advised Citizens Gas Company of Indianapolis was incorporated under the laws of Indiana in May, 1906 and until 1913 supplied gas in part of the City. In that year the company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs. As of January 1, 1935, the company served through owned and leased property, approximately 73,800 domestic, 866 commercial and 523 industrial consumers.

Valuation: Based on an appraisal made by an independent engineer as of January 1, 1935, which took into consideration an allowance of \$700,000 for working capital for Citizens Gas Company, as well as present day average costs, the age of the equipment and the amount and kind of deferred maintenance, the following costs of reproduction new and depreciated physical values were estimated:

| | Cost of Reproduction—New | Depreciated Physical Value |
|----------------------|--------------------------|----------------------------|
| Citizens Gas Co. | \$17,607,310 | \$13,341,230 |
| Indianapolis Gas Co. | 12,730,490 | 9,181,960 |
| | <hr/> | <hr/> |
| | \$30,337,806 | \$22,613,190 |

Prices and descriptive circular upon application
Halsey, Stuart & Co. Otis & Co.
Incorporated

Dated June 1, 1935, Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder at the offices of Halsey, Stuart & Co. in Chicago and in New York City, or at The Union Trust Company in Indianapolis or at the principal office of The Cleveland Trust Company in Cleveland. Coupon bonds in the denomination of \$1,000, registrable as to principal. Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Matson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds. The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935.

PLAINTIFFS' DEPOSITION EXHIBIT 105.

Indianapolis Star, July 8, 1935, p. 15.

\$4,500,000 having been sold of the original offering of
\$8,000,000

City of Indianapolis, Indiana

Gas Plant Revenue $4\frac{1}{2}\%$ Bonds

We offer available maturities, 1948-67

To Yield 3.75% to 4.00%

Tax Exempt in Indiana

Exempt from all present Federal Income Taxation

The City of Indianapolis, Indiana, in exercising its franchise rights to acquire the properties and business of Citizens Gas Company of Indianapolis, and for improvements and extensions to the properties, has issued \$8,000,000 of Gas Plant Revenue $4\frac{1}{2}\%$ Bonds, due serially, without option of prior payment, June 1, 1938 to 1967.

In the opinion of counsel, these bonds are exempt from all present Federal Income Taxation and are also tax exempt in the State of Indiana. The available yields, ranging from 3.75% to 4.00% according to maturities, compare favorably with those of many high-grade corporation bond issues lacking these tax-exempt advantages.

As to security, the City of Indianapolis will own and/or control all of its gas utility system and the City covenants to maintain rates sufficient to produce revenues adequate for payment of principal and interest on these bonds, maintenance costs, operating charges, funds for working capital, repairs and upkeep. In addition, the bonds constitute, in opinion of counsel, valid and binding obligations of the City, principal and interest payable solely from revenues derived by the City from its operation of the entire gas utility system.

The City covenants to deposit monthly from operating revenues of the gas utility system, in special bank accounts, a sum equal to one-twelfth of the annual principal and interest requirements on these bonds; further agreeing that, in this manner, not less than \$360,000 annually in 1936 and 1937, \$450,000 annually in 1938 to 1940, and \$500,000 annually in 1941 to 1967 shall be deposited (under conditions preventing withdrawal of monies from such account or ac-

counts except for the payment of interest on and principal of these bonds).

An appraisal of the Indianapolis gas utility system, including the leased property, made by an independent engineer as of January 1, 1935, which took into consideration an allowance of \$700,000 for working capital, indicates the following values: cost of reproduction (new) \$30,337,800; depreciated physical value \$22,613,190. For the five calendar year period 1931-35, (1935, 5 months actual, 7 months estimated) the annual average balance available for bond service and depreciation (as compiled from the engineer's report, taking into account savings in taxes through municipal ownership as estimated by the City) was \$804,854; annual service charges on these bonds are \$360,000, 1936-37; \$450,000, 1938-40; \$500,000, 1941-67.

Revenue Issues—An
Attractive Type of
Municipal Bonds
Halsey, Stuart & Co.
Incorporated
Chicago, New York
and other principal cities

Informative booklet concerning Revenue Bonds. Recently published, this booklet provides facts of interest to investors concerning municipal bonds of the "revenue" type—how to appraise them, legal status, marketability, etc.

Write for booklet JS-7
Prices and descriptive circular upon application
Halsey, Stuart & Co.
Incorporated

201 South La Salle Street - Telephone State 3900
Chicago, New York and Other Principal Cities

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 8, 1935.

"(Plaintiffs' Deposition Exhibit 106 is identical with City's Exhibit 11)".

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 107.

(Letterhead of Halsey, Stuart & Co.)

September 20, 1935.

Mr. Newton Todd,
106 E. Market St.,
Indianapolis, Indiana
Dear Mr. Todd:

At the request of our representative, Mr. W. R. Cosby, we are enclosing circulars descriptive of our current offering of City of Indianapolis, Indiana 4½% Gas Plant Revenue Bonds. We are giving below a list of maturities in which these obligations are presently available, on which corresponding basis prices and concessions are shown:

| Maturity | Basis | Concession |
|----------|-------|------------|
| 1947 8 | 3.75% | 1 % |
| 1949 50 | 3.80 | 1 |
| 1951/52 | 3.85 | 1½ |
| 1953/55 | 3.90 | 1½ |
| 1958 59 | 4.00 | 1½ |
| 1962 67 | 4.00 | 1½ |

Round amounts of bonds are available in the above maturities with the following exceptions, where we are noting the amount available: 1947, \$6,000; 1948, \$14,000; 1951, \$4,000; 1958 \$1,000; and 1959, \$5,000.

This offering is, of course, necessarily made strictly subject to prior sale and change in price and concession without notice.

Please feel free to communicate with the writer, either by wire or telephone at our expense, for reservations or in case you desire additional information on the offering.

Very truly yours,

Halsey, Stuart & Co.

By R. H. Walter

R. H. Walter/DR
Encls.

PLAINTIFF'S DEPOSITION EXHIBIT 108.

(Letterhead of Halsey, Stuart & Co., Inc., Chicago.)

December 7, 1936.

Newton Todd,
415 Lemcke Building,
Indianapolis,
Indiana.

Gentlemen:

We are in receipt of your comments of the fourth instant regarding the Indianapolis Gas situation.

The questions which you raise are of a purely legal nature arising because of the controversy between Indianapolis Gas Company and the Municipal Utility District and for the reason that we have not at any time had much interest in this controversy we do not feel qualified to attempt to answer your questions. We presume Mr. Thompson, counsel for the Utility District can best advise you what his objective is. We have had no discussion or correspondence with him about the situation.

Our interest in the financing was confined entirely to the issue of Utility District Gas Plant Revenue 4 1/2s, a circular of which released at the time of our general offering over a year ago is enclosed herewith. The statements contained therein were approved by attorneys for the city and by engineers whose report on this project was available to us.

Very truly yours,

Halsey, Stuart & Co., Inc.,
By R. E. Simond

(Ans.)
RES:MES.
Encl.

PLAINTIFF'S DEPOSITION EXHIBIT 109.

December 4, 1936.

Halsey, Stuart & Co.,
201 S. LaSalle St.,
Chicago, Ill.

Gentlemen:

I am enclosing herewith a clipping from the Indianapolis News. What legal right does the City of Indianapolis have to use the income it receives from a property wholly owned by the City, to pay principal and interest on bonds issued by a separate corporation? The Citizens Gas & Coke Utility owns no property whatever and has no funds with which to pay bond interest or principal, except, such income paid to it by the City of Indianapolis from a property owned in fee by the City. It seems to me that a tax payer of the City of Indianapolis could enjoin the City from making payments to service the Gas Utility.

The Citizens Gas & Coke Utility is using the mains of the Indianapolis Gas Company to deliver about 70% of the total amount of gas supplied in this City and the City is paying into escrow the interest on the Indianapolis Gas bonds and the dividend on Indianapolis Gas stock. I hold Indianapolis Gas bonds and between six and seven hundred shares of Indianapolis Gas stock. I am advised that the escrow agreement was made between the City of Indianapolis and directors of the Indianapolis Gas Company. I am in no way a party to this agreement.

In his answer to the suit of the Chase National Bank, Mr. Thompson, the attorney for the Utility District, avers that your offering circular of the Indianapolis Gas Plant Revenue bonds was not authorized by him or the City. In this circular you place a value on the Indianapolis Gas property and the old Citizens Gas property. Some statements in the circular do not agree with reports made to the Public Service Commission.

I would like to know just what Mr. Thompson's objective is. I am informed that he made overtures to trade Gas Plant Revenue bonds for Indianapolis Gas stock. I would rather hold my Indianapolis Gas stock than exchange for these bonds on a par for par basis, unless, I could dispose of the bonds.

Yours very truly,

Newton Todd.

PLAINTIFF'S DEPOSITION EXHIBIT 110.

STATEMENT PERTAINING TO PROPOSED ISSUE
OF INDIANAPOLIS GAS PLANT REVENUE BONDS.

Statement.

It has been adjudicated by the courts that a public charitable trust exists in the property of Citizens Gas Company of Indianapolis in favor of the inhabitants of the City of Indianapolis; and that the City of Indianapolis is to take over and operate such property, subject to outstanding legal obligations, when the capital stock of the Company has been retired.

The Articles of Incorporation of the Citizens Gas Company, as amended, provide that its common stock shall be under the control of a board of self-perpetuating trustees who shall hold and vote the stock and issue certificates to the subscribers to capital stock, and that:

"When all outstanding preferred stock of the company shall have been retired and the holders of the certificates representing the common stock shall have received by dividends, or otherwise, upon said certificates, an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then said certificates shall be deemed fully paid and cancelled, and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to the City of Indianapolis, subject to all outstanding legal obligations of the company, to be owned and operated or leased by it, and all the rights, title and interest of said company or its certificate holders, stockholders, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up."

And it is provided by a franchise contract granted by the City of Indianapolis and assigned to the Citizens Gas Company that:

"If the plant and system of mains of said company shall not have become the property of said city by the cancellation of the certificates of subscribers and conveyance of such property to such city by the board of directors and trustees of said company on or before the expiration of the aforesaid period of said franchise, then said city, by and

through its board of public works, upon the expiration of said franchise period' (August 30, 1930) "shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated, or owned and leased by it."

Litigation by stockholders or certificate holders of the Citizens Gas Company to which the City of Indianapolis and the Company were defendants, established that this franchise contract was not a purchase or contract to purchase by the City but created a public charitable trust in the Company's property with the obligation on the part of the Company to transfer the property to the City when the Company's capital stock was retired: *Todd v. Citizens Gas Company, et al.*, 46 Fed. 2nd. 855 (C. C. A. 7; c. d. 283 U. S. 852). The validity of this trust was recognized by the Supreme Court of Indiana: *Williams v. Citizen Gas Company et al.*, 206 Ind. 448.

The City of Indianapolis has demanded that the Company pay off its stockholders and transfer its property to the City, reserving to the City the right to furnish funds for such purpose. The boards of directors and trustees of the Company have adopted resolutions recognizing the City's rights in the premises, and declaring that such boards would proceed in all lawful ways to carry out the obligations of the Company to certificate holders and stockholders and having discharged such obligations, transfer the property of the City to the Company.

At present (May, 1935) the Mayor of Indianapolis is John W. Kern, Jr.; Walter C. Boetcher is city controller; the board of directors for utilities consists of Henry L. Dithmer, president; Fred Jungclaus, vice-president; Brodehurst Elsey, treasurer; Roy Sahn, secretary; and Isaac E. Woodard; and the board of trustees for utilities consists of Wm. J. Mooney, Sr., president, George J. Marott, A. D. Hiltz, and A. M. Glossbrenner.

A statute effective March 13, 1935 (Chapter 311 Acts 1935) authorizes the board of directors for utilities to issue revenue bonds for the purpose of obtaining funds with which to pay for the acquisition of utility property in which the city has an interest, including money required to be paid for the purpose of redeeming or extinguishing capital stock and paying outstanding obligations of such utility, and making extensions, improvements and betterments. Such bonds are to be paid solely and exclusively from the

revenues of such utility property, and not out of taxes; they are to be exempt from taxation as to principal and income; and are valid without the necessity of any approval of or ratification by either the public service commission of Indiana or the state board of tax commissioners of Indiana. The board may cause such bonds to be sold at a discount of not to exceed five per cent, with interest coupons at a rate not to exceed five and one half per cent, with the right to reject any and all bids, but the interest cost to the city for the money so received shall not exceed five and one half per cent.

The City of Indianapolis has a population of 364,161 according to the Federal census of 1930, which is included within its metropolitan district, as established by the Census Bureau, with a population of 417,685.

For over twenty-one years gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and with 75,949 meters in use as of May 1, 1935.

This system is in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company, which is not an operating company.

The Citizens Gas Company owns a coke oven plant at what is known as its Prospect Street station, consisting of three batteries of forty ovens each, with two water gas sets, and holder capacity of 9,000,000 cubic feet. It owns approximately 40 per cent of the mains in the system.

The leased property owned by Indianapolis Gas Company and operated by Citizens Gas Company since October, 1913, includes a battery of forty one coke ovens, four water gas sets, and a holder capacity of 3,000,000 cubic feet, located at what is known as the Langsdale Avenue plant; also approximately 60 per cent of the mains of the system.

The lease is for a term of 99 years from October 1, 1913, subject to a mortgage dated October 1, 1902, from Indianapolis Gas Company to Trust Company of America securing a 5% fifty year bond issue of \$7,500,000 (not all of which bonds have been issued). The rental thereunder is (a) the amount of the interest on the outstanding bonds under said mortgage, and on any refunding bonds; (b) an amount equal to six per cent. annually on the \$2,000,000 capital stock of said Indianapolis Gas Company (with a possible increase of \$15,000 if the price of gas to the consumer does not exceed 45 cents per thousand cubic feet);

and (c) \$300 annually for organization expense. The lessee agrees to pay all taxes assessed against the Indianapolis Gas Company and its property. The covenants of the lease are for the parties, their successors and assigns. The lease contains a recognition of the rights of the City of Indianapolis under the terms of the franchise contract. In 1934 the total rent paid by the Citizens Gas Company under this lease was \$482,527.76, consisting of \$343,150 bond interest; \$120,000 dividends on stock; \$19,077.76 Federal income tax against Indianapolis Gas Company; plus \$300.

.

PLAINTIFFS' DEPOSITION EXHIBIT 111.

June 27, 1935.

Thompson, Rabb & Stevenson,
Consolidated Building,
Indianapolis, Indiana
Gentlemen:

In accordance with our conversation today I am enclosing herewith a preliminary copy of our proposed circular descriptive of the \$8,000,000 Indianapolis Gas Plant Revenue Bonds, delivery of which we accepted today and which we expect to offer, jointly with Otis & Company, at the beginning of business Monday.

While I appreciate that you cannot substantiate perhaps the figures which our engineers obtained for us, it would be very helpful if you would give us your approval of the circular, insofar as you are able, either by telephone or telegraph, our expense, confirming this by initialing the circular and returning it to us.

I realize this means I am imposing on you to the extent that you probably will have to give this your prompt attention, but the circumstances are such that we are very anxious to have your approval of the circular as early tomorrow as possible.

Very truly yours,

RES:DR
Encl.

PLAINTIFFS' DEPOSITION EXHIBIT 112.

(Confirmation of telegram of Thompson, Rabb & Stevenson, Indianapolis.)

June 28, 1935.

Halsey Stuart & Co.
201 South LaSalle St.,
Chicago Illinois

Our only suggestion is that words quote or sale or disposition of any part unquote in next to last paragraph of Indianapolis Gas circular be eliminated see pages seventeen and eighteen of Utilities Board resolution.

Thompson Rabb & Stevenson.

Collect

PLAINTIFFS' DEPOSITION EXHIBIT 113.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

June 28, 1935.

Mr. R. E. Simond,
Halsey Stuart & Co.
201 S. LaSalle St.
Chicago, Illinois.

Dear Sir:

Herewith we return proof of your circular with respect to City of Indianapolis Gas Plant Revenue Bonds enclosed with your letter of June 27th.

As stated over the telephone and in our wire the words "or sale or disposition of any part" in the third sentence of the next to the last paragraph of this circular should be eliminated so as to conform with the bond resolution as shown by its 17th and 18th pages.

As to the remainder of the circular we have no comment. As heretofore stated to you we, of course, can make no statement with respect to the facts furnished you by your engineer.

We shall be pleased to have for the permanent files of the city a copy of the circular in final form.

Very truly yours,

A. L. Rabb.

6th and 11th days in 6/1/35
TR
G. L. K. M.
PRELIMINARY—Subject to Correction.

EXEMPT FROM ALL PRESENT FEDERAL INCOME TAXATION
TAX EXEMPT IN THE STATE OF INDIANA

\$8,000,000

CITY OF INDIANAPOLIS, INDIANA GAS PLANT REVENUE

4½% Bonds

Dated June 1, 1935

Due serially June 1, 1938 to 1967,
both inclusive

Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder in New York City, Chicago, Cleveland or Indianapolis. Coupon bonds in the denomination of \$1,000, registerable as to principal.

Under a resolution adopted May 7, 1935 by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds for acquiring the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and or operated by said City and payable solely and exclusively out of such income and revenues.

Under said resolution adopted May 7, 1935 the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the City agrees that there will be credited in this manner to such bond and interest fund not less than \$300,000 annually in the years 1936 and 1937; \$450,000 annually in the years 1938 to 1940, both inclusive; \$500,000 annually in the years 1941 to 1967, both inclusive.

AMOUNTS AND MATURITIES

| | | |
|------------------------|------------------------|------------------------|
| \$ 90,000 June 1, 1938 | \$207,000 June 1, 1948 | \$322,000 June 1, 1958 |
| 91,000 June 1, 1939 | 216,000 June 1, 1949 | 336,000 June 1, 1959 |
| 92,000 June 1, 1940 | 226,000 June 1, 1950 | 351,000 June 1, 1960 |
| 152,000 June 1, 1941 | 236,000 June 1, 1951 | 367,000 June 1, 1961 |
| 159,000 June 1, 1942 | 247,000 June 1, 1952 | 384,000 June 1, 1962 |
| 166,000 June 1, 1943 | 258,000 June 1, 1953 | 401,000 June 1, 1963 |
| 174,000 June 1, 1944 | 270,000 June 1, 1954 | 419,000 June 1, 1964 |
| 182,000 June 1, 1945 | 282,000 June 1, 1955 | 438,000 June 1, 1965 |
| 190,000 June 1, 1946 | 295,000 June 1, 1956 | 458,000 June 1, 1966 |
| 198,000 June 1, 1947 | 308,000 June 1, 1957 | 475,000 June 1, 1967 |

Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Watson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds.

Plaintiff's Ex

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The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the City agrees that there will be credited in this manner to such bond and interest fund not less than \$360,000 annually in the years 1936 and 1937; \$450,000 annually in the years 1938 to 1940, both inclusive; \$500,000 annually in the years 1941 to 1967, both inclusive.

AMOUNTS AND MATURITIES

| | | |
|------------------------|------------------------|------------------------|
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| 198,000 June 1, 1947 | 308,000 June 1, 1957 | 475,000 June 1, 1967 |

Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Marvin, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds.

HALSEY, STUART & CO.

INCORPORATED

CHICAGO, 201 South La Salle Street NEW YORK, 35 Wall Street

AND OTHER PRINCIPAL CITIES

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

Circular No. 2406

July 1, 1935

Plaintiff's Exhibit 114

PURPOSE OF ISSUE

Pursuant to a resolution adopted by the Board of Directors for Utilities of the City of Indianapolis, Indiana, on May 7, 1935, entitled "A resolution (No. 2-1935) for the issuance of Gas Plant Revenue Bonds," and in compliance with all applicable provisions of law including Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931 and Chapter 125 of the Acts of 1933, as amended by Chapter 311 of the Acts of 1935 of the General Assembly of the State of Indiana, these bonds are issued to provide funds for the purpose of taking over property owned by the Citizens Gas Company of Indianapolis and or in which it has an interest including monies required to be paid for the redemption or extinguishment of its capital stock and or for the payment of certain of its obligations (including funded debt) and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

TERRITORY SERVED

Upon consummation of this acquisition the City advises it will control a business supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its suburbs. Indianapolis, the capital of the State of Indiana and the county seat of Marion County, is located in the central part of the State. It is an important manufacturing, commercial and financial center. According to the 1930 census the City had a population of 364,161 with an estimated population including the suburban area of more than 127,000. Seven railroads and numerous bus lines entering the city supply ample transportation.

HISTORY AND BUSINESS OF CITIZENS GAS COMPANY OF INDIANAPOLIS

We are advised Citizens Gas Company of Indianapolis was incorporated under the laws of Indiana in May, 1906 and until 1913 supplied gas in part of the City. In that year the company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs. By the terms of this lease, the lessee pays a rental consisting of (1) the interest on the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds due October 1, 1932, of which there were \$6,380,000 principal amount outstanding at December 31, 1934 and the interest on such additional bonds as may be issued from time to time for refunding or extensions to the leased property; (2) an amount equivalent to 6% per annum on the \$2,000,000 of capital stock of Indianapolis Gas Company (with a possible increase of \$15,000 if the price of gas to the consumer does not exceed 15 cents per thousand cubic feet); (3) \$300 annually for organization expense and (4) such amounts equal to the taxes levied against the property including Federal Income Tax. As of January 1, 1935 the company served through owned and leased property, 73,800 domestic, 866 commercial and 523 industrial consumers.

An appraisal made by an independent engineer found that as of January 1, 1935 the owned property of Citizens Gas Company consisted of a coke oven plant, known as Prospect Street Station, comprising three batteries of forty 14-ton Wilputte ovens with a total daily capacity of 11,000,000 cubic feet and two 3' 6" water gas sets having a total daily capacity of 1,800,000 cubic feet and 9,000,000 cubic feet of holder capacity. The distribution system consists of approximately 336 miles of cast iron and steel mains. The leased property, owned by Indianapolis Gas Company according to the same appraisal, consists of a coke oven plant of one battery of forty-one 15-ton Semet-Sulvay coke ovens with a daily capacity of 3,500,000 cubic feet, also two 11' 0" and two 7' 6" water gas sets, with a total daily capacity of 6,000,000 cubic feet and holder capacity of 3,000,000 cubic feet. The distribution system consists of approximately 531 miles of cast iron and steel mains. Based on this appraisal which took into consideration an allowance of \$700,000 for working capital for Citizens Gas Company, as well as present day average costs, the age of the equipment and the amount and kind of deferred maintenance, the following costs of reproduction new and depreciated physical values as of January 1, 1935, were estimated:

| Cost of Reproduction—New | Depreciated Physical Value |
|--------------------------|----------------------------|
|--------------------------|----------------------------|

and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

TERRITORY SERVED

Upon consummation of this acquisition the City advises it will control a business supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its suburbs. Indianapolis, the capital of the State of Indiana and the county seat of Marion County, is located in the central part of the State. It is an important manufacturing, commercial and financial center. According to the 1930 census the City had a population of 364,161 with an estimated population including the suburban area of more than 127,000. Seven railroads and numerous bus lines entering the city supply ample transportation.

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| | Cost of Reproduction—New | Depreciated Physical Value |
|--------------------------|--------------------------|----------------------------|
| Citizens Gas Company | \$17,607,310 | \$13,431,230 |
| Indianapolis Gas Company | 12,730,190 | 9,181,960 |
| | \$30,337,500 | \$22,613,190 |

At the present time we are advised the coke oven and water gas plants of the leased property are not used in operations but it is anticipated that the coke oven plant will be in operation by October 1, 1935. The by-products from the coke oven operations include coke, ammonia and coal tar, which in the past have

been sold in the open market through various sales agencies. The coal requirements of Citizens Gas Company have been purchased principally from the Milburn By-Products Coal Company, Milburn, West Virginia, the entire capital stock of which is owned by Citizens Gas Company. Other coal purchases are made from other coal producers of the quality and quantity necessary for blending purposes. We are advised the capacity of the Milburn coal mine is greatly in excess of requirements.

INCOME STATEMENT CALENDAR YEARS 1931-1935*

The following comparative earning statement of Citizens Gas Company, was obtained from an independent engineer's report submitted us June 22, 1935:

| | 1931 | 1932 | 1933 | 1934 | 1935* |
|--|-------------|-------------|-------------|-------------|-------------|
| Total Income | \$5,049,486 | \$4,326,724 | \$4,148,698 | \$4,773,273 | \$5,103,650 |
| Operating Expenses, Taxes and Rentals | 4,224,566 | 3,731,900 | 3,628,957 | 4,104,460 | 4,351,400 |
| Balance | \$ 824,920 | \$ 594,824 | \$ 519,741 | \$ 668,813 | \$ 752,250 |
| Add: Estimated savings in taxes through municipal ownership and operation (see note) | \$ 163,664 | \$ 142,516 | \$ 122,733 | \$ 113,811 | \$ 121,000 |
| Balance available for bond service and depreciation | \$ 988,584 | \$ 737,340 | \$ 642,474 | \$ 782,624 | \$ 873,250 |

The annual service charge on this issue is \$360,000 1936-1937; \$150,000 1938-1940; \$500,000 1941-1967.

(Note)—The City states that through municipal ownership and operation of Citizens Gas Company there will be a savings of Federal Income and City taxes which in the years covered above would have approximated the amounts shown.

*1935—5 months actual, 7 months estimated.

THE FEASIBILITY OF NATURAL GAS

The City has been considering the possibility of introducing natural gas into Indianapolis provided it can be purchased at a sufficiently attractive price. An independent survey by recognized engineers finds it would be entirely feasible for the City to serve mixed natural and manufactured gas to domestic and commercial consumers and straight natural gas to industrial consumers. The change from manufactured gas to natural or mixed gas operation would, in engineer's opinion, necessitate a further expenditure of approximately \$2,500,000 to extend the distribution system but the belief is that such operation will materially improve the earning power of these properties. The sale of the present issue of \$3,000,000 bonds, together with cash now on hand provides approximately \$1,500,000 cash over and above the cost of acquisition of the property. It is the engineer's estimate that for the first normal year after the introduction of natural gas gross revenues would slightly exceed \$5,000,000; net income before depreciation slightly under \$2,450,000, while in the fifth year gross should approximate \$10,600,000 and net income before depreciation should exceed \$2,925,000.

SECURITY

These Gas Plant Revenue bonds constitute, in the opinion of counsel, valid and legally binding obligations of the City of Indianapolis, secured by a charge upon all of the revenues derived from the entire gas system owned and or operated by the City of Indianapolis and principal and interest on the bonds are payable solely from such revenues.

the company

Amended

based on revenues; over 10 years

study opportunity

done

990,000

may long serve

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|--|-------------|-------------|-------------|-------------|-------------|
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*1935—5 months actual, 7 months estimated

THE FEASIBILITY OF NATURAL GAS

The City has been considering the possibility of introducing natural gas into Indianapolis provided it can be purchased at a sufficiently attractive price. An independent survey by recognized engineers finds it would be entirely feasible for the City to serve mixed natural and manufactured gas to domestic and commercial consumers and straight natural gas to industrial consumers. The change from manufactured gas to natural or mixed gas operation would, in engineer's opinion, necessitate a further expenditure of approximately \$2,500,000 to extend the distribution system but the belief is that such operation will materially improve the earning power of these properties. The sale of the present issue of \$3,000,000 bonds, together with cash now on hand provides approximately \$1,500,000 cash over and above the cost of acquisition of the property. It is the engineer's estimate that for the first normal year after the introduction of natural gas gross revenues would slightly exceed \$5,000,000; net income before depreciation should exceed \$2,035,000, while in the fifth year gross should approximate \$10,000,000 and net income before depreciation should exceed \$2,035,000.

SECURITY

These Gas Plant Revenue bonds constitute, in the opinion of counsel, valid and legally binding obligations of the City of Indianapolis, secured by a charge upon all of the revenues derived from the entire gas system owned and or operated by the City of Indianapolis and principal and interest on the bonds are payable solely from such revenues.

COVENANTS OF THE CITY

With respect to these bonds the City covenants:

That it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis, in a special account under such conditions as that the monies cannot be withdrawn from such account or accounts, except for the payment of interest on and the principal of these bonds, on the fifteenth day of each month during the operation of said gas system by the City out of the revenues derived from the operation of said gas system a sum equal to one-

based on summary; over up to 10 years.

my bond service

SEC

990.000
along opportunity
done

twelfth of the annual amount due and payable for principal and interest on the next succeeding date of said bonds and the City agrees that there will be credited to this bond and interest fund, \$300,000 annually 1936-1937; \$150,000 annually 1938-1940 and \$500,000 annually 1941-1967;

That it will fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of the 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep;

That upon acquisition of the property operated by the Citizens Gas Company, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County, Indiana and the towns therein;

That so long as any of these bonds are outstanding and unpaid the City shall maintain insurance on the insurable parts of said gas system of a kind and in an amount as would normally be carried by privately owned companies engaged in a similar business; which insurance shall be placed and maintained in responsible and qualified companies and the proceeds of such insurance shall be used in replacing, repairing or rehabilitating property destroyed or damaged, or in extensions, additions or improvements and if not so used shall be used in the purchase and retirement of outstanding bonds;

That so long as any of these bonds are outstanding and unpaid, not to sell, mortgage or dispose of said gas system or any substantial and useful part thereof unless the proceeds of such sale or disposition are used for the payment of the principal and interest of the then outstanding and unpaid bonds. The right to lease such utility property and gas system on terms and in a manner consistent with law, may be exercised provided the terms do not adversely affect the rights and interest of the holders of these bonds. The city prior to the execution of any such lease or sale or disposition of any part of the gas system under the terms hereof, agrees to give notice if or when it intends to execute any such lease through publication in one newspaper, printed in the English language, of general circulation, in the City of Indianapolis, Indiana, in the City of Chicago, Illinois and in the City of New York, New York, at least four weeks prior to the execution of such lease.

That so long as any of these bonds are outstanding and unpaid, it shall not issue additional bonds or other obligations payable out of the revenues of said gas system except for refunding said outstanding bonds or for the acquisition of revenue producing property, betterments, extensions and or additions.

We Recommend These Bonds for Investment.

PRICE ON APPLICATION

“(Plaintiffs' Deposition Exhibit 115 is the report of Arthur Mullergren and Company dated June 22, 1935. The testimony concerning this report appears in the deposition of R. E. Simond, Plaintiffs' Exhibit 133)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 116.

U C M

Chicago Office
February 21, 1939

Mr. R. E. Simond,
Chicago Office.

The original offering advertisement on the \$8,000,000 City of Indianapolis, Ind. Gas Plant Revenue 4½% Bonds (marked advertisement ± 1 , attached) appeared on the dates and in the publications listed below:

| | |
|-----------------------------|--------|
| Akron Press | July 1 |
| Akron Beacon Journal | “ |
| Anderson Bulletin | “ |
| Boston Herald Traveler | “ |
| Chicago Daily News | “ |
| Chicago Herald Examiner | “ |
| Chicago Journal of Commerce | “ |
| Chicago Tribune | “ |
| Cincinnati Post | “ |
| Cincinnati Times Star | “ |
| Cincinnati Enquirer | “ |
| Cleveland Press | “ |
| Cleveland News | “ |
| Cleveland Plain Dealer | “ |
| Columbus Citizen | “ |
| Columbus Ohio State Journal | “ |
| Columbus Dispatch | “ |
| Denver Rocky Mountain News | “ |
| Denver Post | “ |
| Detroit Free Press | “ |
| Evansville Courier | “ |
| Elkhart Truth | “ |
| Ft. Wayne Journal Gazette | “ |
| Gary Post Tribune | “ |
| Hammond Times | “ |
| Indianapolis Times | “ |
| Indianapolis Star | “ |

| | |
|-------------------------------|--------|
| Indianapolis News | " |
| Kokomo Tribune | " |
| Lafayette Journal & Courier | " |
| Michigan City News | " |
| Muncie Star | " |
| New York Herald Tribune | " |
| New York Sun | " |
| New York Times | " |
| New York Wall St. Journal | " |
| Philadelphia Inquirer | " |
| Richmond Palladium Item | " |
| St. Louis Globe Democrat | " |
| South Bend Tribune | " |
| Terre Haute Star | July 2 |
| Toledo News-Bee | July 1 |
| Toledo Blade | " |
| Toledo Times | July 2 |
| Commercial & Fin'l. Chronicle | July 6 |

A second advertisement—namely, the one marked =2, appeared at a later date in the following publications:

| | |
|---------------------------|-----------|
| Anderson Bulletin | July 8 |
| Evansville Courier | " |
| Elkhart Truth | " |
| Ft. Wayne News Sentinel | " |
| Gary Post Tribune | " |
| Hammond Times | " |
| Indianapolis Star | " |
| Kokomo Tribune | July 8 |
| Lafayette Courier Journal | PM-8:AM-9 |
| Michigan City News | July 8 |
| Muncie Star | " |
| Richmond Palladium Item | PM-8:AM-9 |
| South Bend Tribune | July 8 |
| Terre Haute Star | July 9 |
| Saginaw News | July 16 |

“(Plaintiffs’ Deposition Exhibit 116-A is identical with Plaintiffs’ Deposition Exhibit 104)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

“(Plaintiffs’ Deposition Exhibit 116-B is identical with Plaintiffs’ Deposition Exhibit 105)”.

(Inserted pursuant to stipulation filed November 22, 1939.)

CITY DEPOSITION EXHIBIT 2.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

September 25, 1935.

Halsey, Stuart & Co.,
201 South La Salle St.,
Chicago, Illinois.

Attention of Mr. Simond.

Gentlemen,—

Thank you for your letter of the 23rd.

Russell J. Ryan has now qualified as a director of the Board of Directors for Utilities of the City of Indianapolis. The membership of seven now completes the Board.

Very truly yours,
Thompson, Rabb & Stevenson.

CITY DEPOSITION EXHIBIT 3.

CCL Mr. C. S. Eaton,
Cleveland, Ohio.

September 23, 1935.

Mr. A. L. Rabb,
Thompson, Rabb & Stevenson,
115 No. Pennsylvania Street,
Indianapolis, Indiana.

Dear Mr. Rabb:

I am in receipt of your letter of the twenty-first instant making certain suggestions with respect to the memorandum we prepared regarding anticipating a supplemental offering of our Indianapolis Gas Plant Revenue $4\frac{1}{2}\%$ bonds. As we understand your proposed changes, the text will now appear as follows:

Page 2. Second paragraph will read as follows:

"It is the opinion of counsel for the bankers that it is very doubtful, etc."

The second sentence on that page in which it appears will now read:

"Even if it should be held, however, that the rates are subject to approval of the Public Service Commission, it is the opinion of the bankers' counsel that: etc."

Page 3. The second paragraph beginning with the third sentence will now read as follows:

"Approximately 60% of the distribution system is leased property. It is reasonable to assume that Indianapolis Gas Company recognizes the difficulty of re-establishing itself at this time as a company operating in competition with natural or mixed gas which should be available through municipal operation. Pending satisfactory adjustment of the instrument executed by Indianapolis Gas Company to Citizens Gas Company covering the leased properties, the City rejected an assignment to it by Citizens Gas Company of this lease but indicated to Indianapolis Gas Company that it would continue to operate for six months the leased properties at an equivalent to the former rental. It is expected that the City and the Indianapolis Gas Company will consummate a satisfactory rental or, in the event of failure to accomplish this, the negotiations should result in acquisition by the City of such leased properties which are essential to municipal operation at a satisfactory price including the service charge on the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds due October 1, 1952, of which there were \$6,881,000 principal amount outstanding at December 31, 1934.

Page 5 and again on Page 8, we are adding the word "Estimated" before "Leasehold rentals."

We observe your comments regarding the appointment of Russell J. Ryan, ex-judge of the Marion Superior Court, as a member of the Board of Directors for Utilities and the nomination of Mr. Charles Rauh as a member of the Board of Trustees. We understand Mr. Ryan has accepted his appointment although he is not yet qualified and that Mr. Rauh has not yet been appointed or qualified. Since we propose to release our memorandum this week, perhaps it would be advisable for us not to make any reference to these two gentlemen unless, of course, their appointments have been accepted and they have qualified within the next two or three days.

We appreciate the very prompt attention which you gave this matter and we trust you will keep us advised of any important situations which may develop.

Very truly yours,

Halsey, Stuart & Co.,

By _____

RES:MES

CITY DEPOSITION EXHIBIT 4.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

September 21, 1935.

Mr. R. E. Simond,
Halsey, Stuart & Co.,
201 South LaSalle St.,
Chicago, Illinois.

Dear Mr. Simond,—


Answering your letter dated the 18th, with respect to a form of proposed supplemental circular on City of Indianapolis Gas Plant Revenue Bonds:

Reference is made in such form to opinion of counsel, from which quotations are made. Inasmuch as the original circular refers to the names of more than one counsel, we think mention by specific name should be given to counsel whose opinion is quoted in the present circular. We know of course that we are not the counsel whose opinion is there quoted, nor are we prepared to disagree with the opinion as quoted. But we suggest that counsel be named.

On page 3 of the draft sent us, we think the phrase "on the other hand" in line 7 of the 2nd paragraph should be eliminated, and that the words "an equivalent to" should be inserted in the 14th line of that paragraph after the 4th word; viz: so the line will read "the leased properties at an equivalent to the former rental"; the sentence then to conclude with the word "including" and the balance of what is now the last sentence in that paragraph commencing with the words "the service charge" etc. The words "It is not contemplated that these negotiations will impair" to be eliminated. The last sentence of such paragraph would then be the sentence beginning "It is expected that the City" etc.

On pages 5 and 8, should not the word "estimated" precede the words "leasehold rentals"? Otherwise the impression will be given that a lease is presently in effect; and none is now in effect.

Page 7: Russell J. Ryan, ex-judge of the Marion Superior Court, has been appointed a member of the Board of Directors for Utilities, and has indicated he will accept. He has not as yet actually qualified by filing an executed



certificate of appointment, oath, and bond; but is expected to do so next week. Of course he should not be represented to be a director until he has formally qualified as such. Mr. Charles Rauh has been nominated as a member of the Board of Trustees; but as yet has not been appointed or qualified.

We enclose copy of resolution for use of natural gas adopted by the Board of Directors on September 12th; also copies of two resolutions pertaining to The Indianapolis Gas Company on September 9, 1935.

We make no comment on the other facts stated in the proposed circular, as to most of which we have no personal knowledge; and hence do not discuss.

More specifically with reference to the subject matter of the 2nd paragraph of this letter: the opinion of counsel to which we refer is that quoted on page two of the draft you sent us; not, of course, to page one.

Very truly,

CITY DEPOSITION EXHIBIT 5.

CC: Mr. C. S. Eaton,
Otis & Co.,
Cleveland, Ohio.

September 18, 1935.

Mr. Albert Rabb,
Thompson, Rabb & Stevenson,
Consolidated Building,
Indianapolis, Indiana.

Dear Mr. Rabb:

It is with considerable hesitancy that I submit to you the enclosed copy of a memorandum we are extremely desirous of distributing together with a circular descriptive of the Indianapolis Gas Plant Revenue $4\frac{1}{2}\%$ bonds, all in connection with another solicitation of both dealer and investor business.

In view of the rather unfavorable press notices that have come out with respect to negotiations between the city and the Indianapolis Gas Company concerning the lease we are, of course, anxious to present this matter in the proper light and only for this reason are we imposing upon you to the extent of asking your approval or constructive criticisms of the memorandum.

We trust, accordingly, that you can give us your reaction to this promptly in order that Otis & Co. and we may proceed with our supplemental offering.

Presumably you are aware of the unfavorable market reaction on Indianapolis Gas Company First Mortgage 5's during the past two or three weeks which we can attribute only to unfortunate press comments. First Mortgage 5's have dropped from a price above par to quotes as low as 72, resulting in numerous inquiries and possibly some apprehension about the outcome of your negotiations with Indianapolis Gas Company. Had you given any thought to preparing from time to time statements for the press that would represent properly the status and the aim of these negotiations? It might be helpful in clarifying the uncertainties which have arisen in the minds of some holders of the First Mortgage 5's concerning their investment and indirectly it might help your negotiations with the company itself.

With kindest regards, I am

Very truly yours,

RES:MES

Encl.

PLAINTIFFS' EXHIBIT NO. 134.

• • • • •
“(Certificate of notary omitted in printing)”.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Consolidated Caption—1844 and 1950) • •

Depositions of Chester M. Clark and Joseph Edwards Baker, taken in behalf of the plaintiffs, by stipulation of the parties, before Ernest V. Downey, Notary Public in and for the County of New York, at 15 Broad Street, New York, N. Y., at 10:30 A. M., February 23, 1939.

Appearances :

Milbank, Tweed & Hope, Esqs., Solicitors for the Plaintiffs, Hugh L. M. Cole, Esq. and William J. O'Connell, Esq., of counsel.

William G. Sparks, Esq., Solicitor for defendant Citizens Gas Company of Indianapolis.

W. R. Higgins, Esq., Solicitor for defendant The Indianapolis Gas Company.

W. H. Thompson, Esq., Solicitor for The City of Indianapolis and the individual defendants who are members of the Board of Directors and Board of Trustees of the Department of Utilities of the City of Indianapolis.

CHESTER M. CLARK, of 41 Summit Avenue, Bronxville, New York, called as a witness in behalf of the plaintiffs, having been duly cautioned and sworn, testified as follows:

Mr. Cole: Before interrogating Mr. Clark, I want to offer this copy of a stipulation as an exhibit. The stipulation is signed by all the attorneys and it is to the effect that one deposition may be taken and filed with the Clerk in either one or the other of the two above-entitled causes. I don't believe anybody objects to that as a part of the record.

(Copy of stipulation above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 1, annexed hereto.)

Mr. Cole: I also want to offer as another exhibit a copy of a letter sent to all the attorneys stating the time and place of the taking of the depositions, to which is annexed an affidavit of mailing.

(Copy of letter above referred to received in evidence

and marked PLAINTIFFS' EXHIBIT 2, annexed hereto.)

Mr. Thompson: As far as we are concerned, you don't need to do that. We agreed that the depositions might be taken at this time and no point will be raised about that.

Mr. Cole: May it be so stipulated on the record?

Mr. Thompson: Yes, so far as I am concerned.

Direct Examination by Mr. Cole.

Q. Mr. Clark, will you state your name and place of residence?

A. Chester M. Clark, 41 Summit Avenue, Bronxville, New York.

Q. Are you now associated with the corporation of Stone & Webster and Blodget, Inc.?

A. I am.

Q. Will you state your connection, please?

A. I am Assistant Vice-President of the corporation, in charge of research and analysis. As such I have custody of statistical files.

Q. How long have you been associated with this corporation?

A. Since early in 1927.

Q. Does Stone & Webster and Blodget, Inc. have the custody of any of the files that belong to the old partnership of Blodget & Company?

A. They do.

Q. Are you in charge of the custody of these files?

A. I am.

Q. Do these files include any of the documents relating to the bonds of the Indianapolis Gas Company and Citizens Gas Company?

A. Yes, they do; a number of offering circulars and earning statements, balance sheets, and so forth.

Q. I show you an offering circular of Indianapolis Gas Company, First Consolidated Mortgage 5% Bonds, which has certain data in it relating to Citizens Gas Company and Indianapolis Gas Company, including statements of earnings from 1916 to 1920, and ask you whether you can identify that as coming from the files of Blodget & Company (handing paper to witness)?

A. Yes, that came from the files of Blodget & Company.

Mr. Cole: I offer this in evidence.

Mr. Thompson: The notary had better mark it.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 3, annexed hereto.)

Mr. Thompson: May I see it, please? I would like to ask a question for the purpose of making an objection.

By Mr. Thompson:

Q. Is this date down in the corner, "12/20/21," December 20, 1921, the date when you received this circular?

Mr. O'Connell: Is that in point?

Mr. Thompson: Yes. The circular is undated.

Mr. O'Connell: That is not on the circular itself.

Mr. Cole: All this witness is doing is identifying it. He has not been associated with the firms, as he has already testified, during that period, so I don't see how he can answer that question.

Mr. Thompson: You are offering something and I want to know when it was received. I want to make an objection to it.

Mr. O'Connell: If you know, you can answer, and if you do not know, you can so state.

A. I do not know.

Q. You have no idea when this circular came into the hands of Blodget & Company?

A. No, sir, because I was not a member of the firm at that time.

Q. And you don't know from whom Blodget & Company received the circular?

A. I do not.

Mr. Thompson: The City of Indianapolis and the individuals who are members of its Boards of Trustees and Directors of the Department of Utilities object to the introduction into evidence of this circular for each of the following reasons:

First, it does not purport to have been issued or authorized by the City of Indianapolis, a municipal corporation, and could, in no event, be binding on it.

Second, if this circular is introduced for the purpose of establishing an estoppel against the City of Indianapolis, it is ineffective for that purpose because there has been no showing of any authority on the part of the City of Indianapolis or any of its officers to issue or authorize the issuance of this circular.

Third, the circular is, as to the City of Indianapolis, hearsay, because it does not purport to have been issued or authorized by it or by any of its competent officers.

Mr. Sparks: The Citizens Gas Company objects to the introduction of this exhibit for the reason, first, that

it does not appear that it was authorized by the Citizens Gas Company or any of its authorized officers; that if offered for the purpose of establishing an estoppel, or as an admission, it has no probative value, being an instrument of a conclusion of law as to the extent of the term or the validity of the lease in question; third, it does not appear that anyone in authority from the Citizens Gas Company has issued or circulated or put forward in any manner the information and statements contained in this exhibit; fourth, it does not tend to prove or disprove any of the issues in this case; fifth, it does not appear that anyone relied upon the statements made in this exhibit, or that anyone was entitled to rely thereon; sixth, any statement made by the Citizens Gas Company at that time with reference to the binding effect of this lease upon the successor trustee of the charitable trust could not possibly be effective to bind the City of Indianapolis or the Citizens Gas Company upon a conveyance of its property to the successor trustee.

Mr. O'Connell: It has already been marked.

Mr. Cole: I would like to substitute for the original exhibit a photostatic copy, subject to comparison by the notary. Have that identified as Exhibit 3.

Mr. O'Connell: Is that agreeable to you, gentlemen, that a photostatic copy be substituted?

Mr. Thompson: Oh, surely.

Mr. Sparks: If you will state it is a true copy, we have no objection.

Mr. Cole: I think Mr. Clark will so state.

The Witness: That is a true copy.

Mr. Thompson: Put the photostat in. We have no objection to substituting the photostat.

(Photostat substituted for Plaintiffs' Exhibit 3.)

By Mr. Cole:

Q. I show you another offering circular relating to the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds, containing similar data as that contained in the last exhibit, and showing earnings of the Citizens Gas Company for the year ending December 31, 1924, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer that in evidence.

Mr. Thompson: May I see it, please?

By Mr. Thompson:

Q. You have no knowledge as to when this was received?

A. No, sir.

Q. Or from whom it was received?

A. No, sir.

Q. Or who prepared it?

A. No, I have not.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 4 on the same grounds as stated in the objection to Exhibit No. 3, and on the additional ground that there is no proof as to when this circular was received, from whom it was received and that anyone purchasing bonds of the Indianapolis Gas Company relied or had the right to rely on any statement contained in the circular, particularly as to the statement of the legal question as to the lease for 99 years from the Indianapolis Gas Company to the Citizens Gas Company. In addition, the City of Indianapolis objects on the ground that no statement, even if it had been made, by the initial trustee of a public charitable trust could bind the successor trustee, which is a municipal corporation and which cannot be bound except in accordance with the terms of an explicit statute.

Mr. Sparks: The Citizens Gas Company objects to the Exhibit 4 for the same reasons given in the objections to the introduction in evidence of Exhibit 3.

Mr. Cole: This is off the record.

(Discussion off the record.)

(Paper above referred to received in evidence and marked Plaintiffs' Exhibit 4, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds, containing data similar to that contained in the last exhibit, including earnings of the Citizens Gas Company for the years 1924 and 1925, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. You know nothing about the date of the issuance of this circular?

A. No, sir.

Q. Nor who issued it?

A. No, sir.

Q. All that you know about it is that you found this in the files of Blodget & Company?

A. Yes, sir.

Q. How does it happen to be on the letter-head of Blodget & Company? Is it a circular prepared by that company?

A. I would assume that, because it is on the letter-head of Blodget & Company, it was prepared in Blodget & Company's office.

Mr. Thompson: The City of Indianapolis makes the same objection to Exhibit No. 5 as it made to No. 4.

Mr. Sparks: The Citizens Gas Company objects for the same reasons given in objections to the admission of Exhibit No. 3, and for the further reason that any statement in the circular concerning any guarantee by the Citizens Gas Company as to the principal and the refunding of bonds is a statement of law which cannot be the basis for any estoppel or have any probative value as an admission as to any issue in this case.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 5, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to First and Refunding Mortgage Gold 5% Bonds of Citizens Gas Company, containing data similar to that contained in the offering circular which is the last exhibit, including earnings of Citizens Gas Company for the years 1924 to 1926, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. This circular which has been identified as Exhibit 6 is on the letter-head of Blodget & Company and, presumably, prepared by that company; is that right?

A. Yes, sir.

Q. It is undated?

A. May I interrupt there?

Q. Yes.

A. At the foot of the circular, as I think possibly may have been the case in the previous exhibit and I overlooked it, there is a mark—may I look at that?

Q. Yes (handing paper to witness).

A. "2J6."

Q. What does that mean?

A. It is a code symbol used in the old days by Blodget & Co., subsequently by Stone & Webster and Blodget, Inc., indicating the month and year when the circular was prepared.

Q. Now, what does the code symbol mean?

A. The code symbol means that that was prepared in the year 1926.

Q. December?

A. The 10th month, October.

Q. October?

A. Yes, sir.

Q. And all you know about this circular is that it is on the letter-head of Blodget & Company and you found it in the files?

A. Yes.

Mr. Thompson: We make the same objection on behalf of the City to Exhibit 6 which we made to Exhibit No. 4.

Mr. Sparks: The Citizens Gas Company makes the same objection to this exhibit as it made to Exhibits Nos. 3 and 5.

Mr. Thompson: My attention has been directed to the fact that Exhibit No. 6 relates to the bonds of the Citizens Gas Company.

Mr. Cole: That is correct.

Mr. Thompson: And I object to it on the ground that no circular or representation made by anyone in connection with the sale of bonds of the Citizens Gas Company could have any possible bearing upon the issues involved in this case.

Mr. Sparks: I would also like to add to my previous objection the reason that any circular or any statement issued in connection with the sale or distribution of Citizens Gas Company bonds could have no bearing or be material in any way upon any issue in this case, or in either of the two cases.

Mr. O'Connell: That is No. 6?

Mr. Sparks: No. 6.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 6, annexed hereto.)

By Mr. Cole:

Q. Going back to Exhibits 4 and 5, I observe that they bear the same symbols at the bottom. Can you tell me whether they are explicable in the same manner as the symbol that is on Exhibit 6 (handing papers to witness)?

A. They are. Exhibit 4, according to the symbol, was prepared in March, 1925. Exhibit 5, according to the symbol, was prepared in December, 1926.

Mr. Cole: I would like to substitute for the original of Exhibit 6 this photostatic copy and have this marked as the original exhibit. I observe that it does not have the symbol at the bottom, because the corner was evidently turned up. I suggest that the notary or the stenographer put the symbol on in ink so that it will be identical, subject to comparison by the notary.

Mr. Sparks: That is agreeable.

(Notary marks "2J6" on photostat substituted for original of Plaintiffs' Exhibit 6.)

Q. I show you another offering circular which relates to the First and Refunding Mortgage 5% Bonds of the Citizens Gas Company and to the First Consolidated Mortgage 5% Bonds of the Indianapolis Gas Company.

Mr. Higgins: Is that a joint circular?

Mr. Cole: They are both in the one exhibit.

Q. (Continued.) It contains data similar to that contained in Exhibit 6. I ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Is there any code symbol by which you can tell the date of this?

A. There is no code symbol which is intelligible to me. There is a code symbol there, but I do not know what it means.

Q. "ZF2" is the code symbol?

A. Yes. I do not know what it means.

Q. And this is a circular that was issued by Blodget & Company?

A. That is correct.

Q. You have no knowledge of where the information came from which Blodget & Company used in the preparation of that circular?

A. I personally have no knowledge of it.

Mr. Thompson: The defendant City of Indianapolis makes the same objection to Exhibit 7 that it made to Exhibit 4, plus the objection that this is a self-serving declaration on the part of Blodget & Company and not binding on the City of Indianapolis, in any event.

Mr. Sparks: The Citizens Gas Company makes the same objection to this exhibit as it made to Exhibit No. 6 and previous exhibits.

(Discussion off the record.)

Q. Anything on the face of any of these circulars which are offered as exhibits which are entries to identify the approximate dates on which they were prepared you may use and state what it is.

A. This circular shows capitalization as of May 1, 1922, and the text contains other dates in the year 1922, such as March 1, 1922, with respect to valuation of physical properties; May 15, 1922, as the date on which certain rate matters came up, all of which, to my mind, indicates that the circular was prepared during the latter part of the year 1922.

Mr. Sparks: May I see that a minute?

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 7, annexed hereto.)

Mr. Cole: I have here the positive of a photostat of Exhibit No. 7 which I wish to substitute for the original. Subject to comparison, I ask that the notary mark that Exhibit 7.

Mr. Thompson: Mr. Cole, we will consent, in connection with any of these exhibits, that you may use photostatic copies instead of the original and no objection will be made on that ground.

Mr. Cole: All right.

(Discussion off the record.)

By Mr. Cole:

Q. I show you another offering circular relating to the First and Refunding Mortgage 5% Bonds of Citizens Gas Company and to the First Consolidated Mortgage 5% Bonds of Indianapolis Gas Company, containing data similar to that contained in Exhibit 7, including earnings of Citizens Gas Company for the twelve months ending December 31, 1923, and ask you if you can identify that as coming from the files of Blodget & Company.

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Can you identify the date of this Exhibit No. 8?

A. April, 1924.

Q. It appears on the letter-head, or, rather, on the head of this exhibit appears "Blodget & Co., 34 Pine Street, New

York." It is a circular apparently prepared by Blodget & Company?

A. That is correct.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit No. 8 on the grounds stated in objecting to Exhibits Nos. 4 and 7.

Mr. Sparks: The Citizens Gas Company objects to the exhibit on the grounds stated in objections to Exhibit No. 7 and previous exhibits.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 8, annexed hereto.)

Mr. Cole: As in the previous cases, I ask that this photostatic copy be substituted.

By Mr. Cole:

Q. I show you an offering circular relating to Indianapolis Gas Company First Mortgage 5% Gold Bonds, containing data similar to that contained in the last exhibit, including earnings of Citizens Gas Company for the year ended December 31, 1915, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Do you know the date of this circular? 1916?

A. I would assume from the date of the information contained in it that it was prepared in 1916.

Q. This is a circular which obviously was prepared and issued by Blodget & Company; is that correct?

A. Yes.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit No. 9 on the same grounds stated in its objections to Exhibits 4 and 7.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of this exhibit for the same reasons stated in its objections to Exhibit No. 6 and previous exhibits.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 9, annexed hereto.)

Mr. Cole: As in the case of the previous exhibits, I wish to substitute this photostatic copy.

Mr. Sparks: I would like to change my objection to this Exhibit 9, if I may.

Mr. Cole: Surely.

Mr. Sparks: I object to it for the reasons stated in the objections to Exhibit No. 7 and previous exhibits.

By Mr. Cole:

Q. I show you another offering circular relating to the Citizens Gas Company First Mortgage Sinking Fund 5% Gold Bonds. In addition to containing data similar to that contained in the last exhibit, it also contains various other statements, including a copy of a letter addressed to Messrs. Blodget & Company, dated March 1, 1916, from J. D. Forrest, as Secretary and General Manager of Citizens Gas Company. I ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This circular came from the files of Blodget & Company.

By Mr. Higgins:

Q. That also would be in 1916, would it?

A. Well, this contains a letter dated March 1, 1915, which would indicate that it was issued at about that time.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. This also is a circular issued by Blodget & Company, this Exhibit No. 10, Mr. Witness?

A. Yes.

Mr. Thompson: May I ask counsel if the original of this letter from Mr. Forrest is in your possession?

Mr. Cole: No, it is not. We are going to explain that.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 10 for the same reasons stated in its objections to Exhibits 4 and 7, and for the additional reason that this Exhibit No. 10 contains what purports to be a letter from J. D. Forrest, Secretary and General Manager of the Citizens Gas Company of Indianapolis, that this is not the original letter, it is not competent and is purely hearsay. In addition, this circular shows upon its face that the Citizens Gas Company was a quasi public corporation, and the fact is that the Citizens Gas Company of Indianapolis was merely the initial trustee of a public charitable trust with a fixed term or expiration of its trusteeship, that is, twenty-five years after the franchise contract of 1905 was granted, so that the Citizens Gas Company, as the initial trustee for a public charitable trust, could not estop its successor trustee, the City of Indianapolis, by any statement made by it; and, in addition, there is no showing that Mr. Forrest,

as the Secretary and General Manager of the Citizens Gas Company, had the slightest authority as such even to bind the Citizens Gas Company.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of this exhibit for the reasons heretofore stated in its objections to Exhibit 7 and previous exhibits; and also for the additional reasons just stated by counsel for the City of Indianapolis.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 10, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to the Citizens Gas Company First and Refunding Mortgage 5% Gold Bonds, containing various statements concerning the Citizens Gas Company and its property and the security for the bonds, including earning statements for the year ended December 31, 1918. This bears a date, July, 1919, at the bottom of the first page. I ask you whether you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Exhibit 11 is also a circular issued by Blodget & Company?

A. Yes, sir.

Q. That circular was issued in July, 1919, as appears on the first sheet of Exhibit 11?

A. That is correct.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit 11 on the grounds stated in our objections to Exhibits 4 and 7.

Mr. Sparks: The Citizens Gas Company objects to this exhibit for the reasons stated in its objection to Exhibit No. 6.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 11, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to \$1,500,000. of Citizens Gas Company General Mortgage Sinking Fund 7% Gold Bonds, containing data relating to the business of Citizens Gas Company, its management, the security of the bonds and the earnings, including a copy of a letter dated June 15, 1918, addressed to Messrs.

Blodget & Company, and signed by J. D. Forrest, Secretary and General Manager of the Citizens Gas Company, and ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Higgins:

Q. At what time, Mr. Clark, was that issued; can you tell?

A. The letter inside is dated June 15, 1918. I would, therefore, say that the circular was issued shortly thereafter.

By Mr. Thompson:

Q. Exhibit No. 12 is a circular issued by Blodget & Company; is that correct?

A. That is correct.

Q. Did you find the original of the letter therein contained, the copy of the letter therein contained, signed by Mr. J. D. Forrest and addressed to Blodget & Company?

A. I made a search for such a letter and I couldn't find it.

Q. And, of course, it goes without saying that, not being able to find the letter, you know nothing about whether this is an accurate copy of it?

A. Of my own knowledge, I don't know whether it is or not.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 12 for the reasons stated in its objection to Exhibits 4, 7 and 10, and for this additional reason: this is an offering of \$1,500,000. of Citizens Gas Company General Mortgage Sinking Fund 7% Gold Bonds. Under the public charitable trust created by the franchise contract of 1905, and other relevant papers, the Citizens Gas Company of Indianapolis had no power or authority to mortgage its property, it being expressly provided by the terms of that public charitable trust that at the end of the franchise period in 1930, if the precedent obligations of that public charitable trust, that is, the stock of the Citizens Gas Company, had not been paid in full, then the Citizens Gas Company may execute a mortgage for the purpose of obtaining funds with which to pay off the precedent obligations. These mortgage bonds having been issued in violation of the public chari-

table trust, no statement made in connection with them could bind the City of Indianapolis.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of Exhibit No. 12 upon the same grounds stated in its objection to Exhibit No. 10 and previous objection.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 12, annexed hereto.)

Mr. Cole: As in the case of earlier exhibits, I wish to substitute for the original exhibit this photostatic copy, subject to comparison.

By Mr. Cole:

Q. You just testified with respect to Exhibit 12 you could not find the original of the letter from Mr. Forrest, of which a copy purports to be set forth. Is that equally true of the letter which is contained in Exhibit 10?

A. That is equally true of the letter which is contained in Exhibit 10. In that connection, I might say that, to my knowledge, none of the correspondence files of Blodget & Company were taken over by Stone & Webster and Blodget, Inc. at the time of their consolidation in January, 1927, and that if such a letter were not in the statistical files, which is the case, I would not have it.

Q. Did you find any signed copies of these circulars which have been offered in evidence, bearing the signature of Mr. Forrest or any representative of the City Gas Company or Indianapolis Gas Company?

A. No, I did not.

Mr. Cole: Those are all the questions I wish to ask Mr. Clark at the moment. If you wish to cross-examine, you may, or would you rather wait?

Mr. Thompson: No; I will examine him briefly.

Cross-Examination by Mr. Thompson.

Q. Do you know where the letter files of Blodget & Company are?

A. No, sir, I do not.

Q. Did you make any inquiry to ascertain whether they were in existence?

A. Yes.

Q. Of whom?

A. Mr. Baker.

Q. Was he formerly connected with Blodget & Company?

A. He was.

Q. Now, all that you know about these Exhibits 3 to 12, inclusive, is that they are various circulars or offerings--they have been designated as "offerings"--which were found in the files of Stone & Webster and Blodget, Inc. and which came from the files of Blodget & Company, turned over to Stone & Webster and Blodget, Inc. upon the consolidation of the two companies in 1926?

A. That is correct.

Q. You have no personal knowledge of who prepared them; is that right?

A. No personal knowledge of who prepared them; that is correct.

Q. The only information that you have about them is what anyone could gather from the face of the exhibits themselves?

A. That is right.

Q. You don't know how they were used.

A. I personally do not know how they were used.

Q. You don't know where the information came from except as it appears in these exhibits themselves?

A. Yes.

Q. Do you mean that you do know?

A. I do not know.

Mr. Thompson: That is all I have to ask.

(Discussion off the record.)

Mr. Thompson: As far as we are concerned, we are perfectly willing to waive the signature.

Mr. Cole: I think we will have him sign it after it is typewritten.

Chester M. Clark.

Subscribed and sworn to before me this _____ day of _____, 1939.

JOSEPH EDWARDS BAKER, of 1220 Park Avenue, New York, N. Y., called as a witness in behalf of the plaintiff, having been duly cautioned and sworn, testified as follows:

Direct Examination by Mr. Cole.

Q. Will you state what connection you had with the firm of Blodget & Company and with Stone & Webster and Blodget, Inc., and for how long you were connected with those concerns?

A. I first became associated with Blodget & Company in 1919, shortly after I left the Army, and subsequently became a partner of that firm and, on December 31, 1926, when the firm of Blodget & Company ceased doing business, together with other partners of Blodget & Company, I became an officer, director and shareholder of Stone & Webster and Blodget, Inc., which was not a consolidation or merger, but we just agreed to quit business, the partnership remaining in existence for liquidation purposes only.

By Mr. Thompson:

Q. Is the correct name Stone & Webster and Blodget, Inc.?

A. Yes. The "and" between "Stone" and "Webster" is the "and-sign," and between "Webster" and "Blodget" it is "a-n-d."

By Mr. Cole:

Q. For what years were you a partner in Blodget & Company?

A. I became a partner of Blodget & Company January 1, 1926.

Q. What is your present occupation?

A. I am a partner of J. E. Baker & Company, investment dealers.

Q. Will you state very briefly your experience in the buying and selling of securities?

A. From the time I became associated with Blodget & Company, continuously up to the present time, my function has been largely that of a buyer, although I have done considerable selling. Most of my selling has been what you would term block selling, in larger amounts. My duties in Blodget & Company, and in Stone & Webster and Blodget, Inc., and in the firm which I organized in 1934, was almost altogether that of the buying partner. In that connection, I bought whole issues of bonds, parts of an issue, for refunding or original capital purposes; I conducted, or caused to be conducted, the investigations that were necessary prior to those purchases; at times bought preferred stocks of corporations; at other times the common stocks; in one instance bought all of the assets of the corporation, which were afterwards recapitalized. In fact, you might say that, either directly for the firms of which I was a partner or an associate, I have participated in every phase of what we generally term the investment banking field. Such purchases,

either for our own account or in association with others, or acting as agents for others, have aggregated over a billion dollars' worth of securities. The firms with which I have been associated have participated in most of the syndicates organized for the purchase and sale of public utility bonds during that period. I have also been engaged in industrial and other corporate activities as well as public utilities. During this period I have qualified and testified before Public Service Commission on matters pertaining to security issues and the rates of return, in the States of California, Ohio, South Carolina, Missouri and New York. I have qualified and testified before the Federal Board of Tax Appeals and I have prepared affidavits acceptable to the U. S. Internal Revenue Department on securities and security values. Amongst miscellaneous things I have done in that period, in the State of Massachusetts, was considering the question of making public utility bonds a legal investment for the savings banks in that Commonwealth. I appeared before the General Court, I think it is termed—it is really the State Legislature—and cooperated with the committee of that General Court in preparing the law. That is, briefly, an outline of my experience.

Q. Are you familiar with the methods employed by firms you have been associated with and others in the sale of securities?

A. I am.

Q. And with the method employed in preparing offering circulars?

A. I am.

Q. While you were associated with Blodget & Company, did that firm sell any of the bonds of the Citizens Gas Company or of the Indianapolis Gas Company?

A. Yes. They sold bonds of both companies, either purchased directly from the company or purchased in the open market. We were constantly making a market on the bonds of both companies, the Citizens Gas Company, the operating company, and the Indianapolis Gas Company, which was leased by the Citizens Gas Company.

Q. Some of these bonds, both of the Citizens and of the Indianapolis, were bought by Blodget & Company from the Citizens Gas Company, were they not, during your association with that firm?

A. They were.

Q. Were you in charge of the dealings between Blodget & Company and the Citizens Gas Company?

A. Yes. During the period of the first phase of my association with Blodget & Company, I worked in close cooperation with one of the partners of the firm, Mr. Bayard F. Pope, and we were the ones who conducted the negotiations either with Mr. Forrest or Mr. Effroymsen.

Q. Can you state, briefly, the nature of your contacts with these gentlemen?

Mr. Thompson: Are you calling now for conversations with them?

Mr. Cole: Anything that may have a bearing on how they happen to buy the bonds.

Mr. Thompson: The City of Indianapolis objects to any conversations between officials of the Citizens Gas Company and Mr. Baker, as the representative of Blodget & Company, for the reason that no estoppel can be predicated against a municipal corporation by the acts or conduct of officers of the initial trustee of the public charitable trust, the term of whose trusteeship was definitely fixed by the underlying papers creating the trust; that under the law of Indiana, which is controlling in this case, a municipal corporation cannot be estopped, either directly or in a quasi manner, and that these conversations or these transactions are, as against the City of Indianapolis, successor trustee of a public charitable trust, hearsay and do not prove or tend to prove any issue in the case.

Mr. Sparks: The Citizens Gas Company objects to testimony as to any conversations in the negotiations for the purchase of these bonds, or otherwise, relating to the effect or validity of the lease in question or the extent of the term or the legal effect of any of its provisions, for the reasons that this evidence cannot prove or disprove any of the issues in either case. Second, that any statement relating to the matters just mentioned must necessarily constitute a statement of a conclusion of law and not a statement of admission of fact having probative value on any issue. Any such statement as to the legal effect of any written instrument, or instrument, cannot be made the basis of an estoppel or as an admission having any probative value. Any such statement cannot create any rights not otherwise existing. Third, assuming that this evidence has any probative value, which we do not admit, which the Citizens Gas Company does not admit, it is not shown that anyone was entitled to rely upon any one statement as to the legal effect of the written instructions involved and of which, in law, every-

one is presumed to have knowledge. Fourth, it does not appear that anyone had any authority, express or implied, to make any representations or statements concerning the matters mentioned in reason No. 1. Fifth, it does not appear that any purchaser of these bonds relied upon any statements or representations made during the negotiations.

(Question repeated by stenographer.)

A. As my memory serves me, I first visited Indianapolis in the Spring of 1920 and while there called on Mr. Forrest, the Secretary and General Manager of the company, and Mr. Effroymsen, Treasurer of the company, and attempted to get generally familiar with the company, its affairs, and especially to investigate the current condition of the company and its finances. While there, aside from direct visits with the company, I called on various citizens of the City of Indianapolis to get a picture of the company's public relations. I regularly received financial statements from the company and, on frequent occasions, received copies of the minutes of the Board of Directors. At least, it was indicated in the letters that they were copies of them. They were not signed or authenticated by the Secretary.

Q. I show you Plaintiffs' Exhibits 3 to 8, which are offering circulars which have been identified as having been used during the period in which you were associated with Blodget & Company, and I ask you whether you will also identify them as having been used by Blodget & Company in connection with the sale of the bonds described in the circulars (handing papers to witness).

Mr. Thompson: I want to object to the form of that question in addition to the objections already stated to the preceding question. It is a general conclusion as to whether they were used. If he has some specific instance to state, that something was done with them, I have no objection to that, but I object to his stating a conclusion that they were used by Blodget & Company.

Mr. Coie: After you have examined them, I will rephrase the question.

Mr. Sparks: You are withdrawing that question?

Mr. Coie: Yes; I will withdraw the question.

Q. Can you state, on your own knowledge, that these circulars are copies of circulars which were distributed by Blodget & Company to its customers in connection with the sales of the bonds therein described?

Mr. Thompson: Now, without the necessity of repeating our objection to each of these questions and interrupting the orderly course of the deposition, may it be understood that to each of these questions put to Mr. Baker the City makes the same objection it made to the initial question asking him for what contacts and conversations he had had with the Citizens Gas Company?

Mr. Cole: Certainly.

Mr. Sparks: And the same as to the Citizens Gas Company.

Mr. Cole: Certainly.

Mr. Thompson: With that understanding, then, we can probably save some time.

A. I do identify these exhibits as being circulars, or copies of circulars, that were used by Blodget & Company, in the sale of these bonds, either to its customers or to other dealers.

Q. Can you state the manner in which they were distributed?

A. Through the mails and by personal delivery.

Q. I call your attention to Exhibits 7 and 8. These do not relate to any particular amount of bonds, but just refer generally to the securities of the two companies. Can you state whether they were used in over-the-counter sales or in connection with an original issue?

A. That I could not definitely state without reference to the books of Blodget & Company. They could have been used for either purpose.

Q. Can you state how these circulars were prepared?

A. They were prepared under my direction from information in our files previously received from the Citizens Gas Company. When we prepared new circulars it was our custom to send a copy of such circulars to Mr. Forrest, in order that Mr. Forrest could call our attention to any discrepancies in them.

Q. Mr. Clark has testified that there are no original communications in the files of Blodget & Company relating to the information contained in these circulars. Can you explain why this is, from your association with Blodget & Company, and the manner in which the files came in the possession of Stone & Webster and Blodget, Inc.?

A. Yes. All of the partners of Blodget & Company became officers, directors and shareholders of Stone & Webster and Blodget, Inc., and in the case of the New York office, certain employees of Stone & Webster, Inc. came into the firm of Stone & Webster and Blodget,

Inc. and they occupied the quarters previously occupied by Blodget & Company, and the files of the two organizations were generally mingled, although the correspondence files belonged to the partnership, Blodget & Company, and they were located in Stone & Webster and Blodget, Inc. for a good many years until, in order to save storage space, some three or four years ago, the partners of Blodget & Company permitted their destruction. In Boston, this new firm occupied quarters previously occupied by the Securities Division of Stone & Webster, Inc., and in that case the files of Blodget & Company were moved into those quarters. To the best of my belief, exactly the same thing happened to those files eventually.

Q. In the ordinary course of marketing securities, has it been your experience that the purchasers rely on statements contained in offering circulars?

Mr. Thompson: We make a special objection to that because ~~it~~ does not make any difference what happens in the ordinary course of business. While it is our claim that the City of Indianapolis cannot be estopped by any conduct on the part of the initial trustee, certainly under the general rules of estoppel we cannot rely on what happens in the ordinary course of business, but it is implicit in the claim of estoppel that you have got to prove and show that representations were made to some given individual who still holds the bonds of the Indianapolis Gas Company and that he relied upon the representations so made.

Mr. Sparks: Let the record show the same objection made by the Citizens Gas Company.

(Question repeated by stenographer.)

A. Yes, they rely on the statements contained in the circulars.

Q. In the particular instance of these circulars, is it your opinion that the purchasers of the bonds described in circulars relied upon the statements?

Mr. Thompson: We object specially to the question because it asks this witness for an opinion and conclusion and not the statement of any fact, and the question of whether a particular purchaser relied could only be established by his evidence.

Mr. Sparks: Let the record show the same objection on the part of the Citizens Gas Company.

A. I would like to be sure I understand that question. I understand the question to mean, did the purchasers,

when receiving one of these circulars, consider that the facts were substantially correct.

Q. And that they relied upon those facts as being correct.

A. Relied upon them?

Q. Yes.

A. I cannot tell you the working of the minds of the buyers. I can say that in my experience I have frequently talked to purchasers of bonds and they have insisted upon receiving a circular before consummating their purchase, even though they had all sorts of published public data before them.

Q. Can you state, through your association with Blodget & Company, and in particular your association in the dealings with the Citizens Gas Company, whether Blodget & Company sold any of the bonds of the Indianapolis Gas Company and Citizens Gas Company prior to the association with the firm?

A. They did.

Q. I would now like to show you the other exhibits. That would be Exhibits 9 to 12, which have been identified as having been prepared and issued prior to your association with the firm, and ask you whether you can identify these as having been issued by Blodget & Company in connection with the sale of the bonds therein described (handing papers to witness).

Mr. Sparks: The Citizens Gas Company objects to that because it appears, from his own previous testimony, that he had no connection with Blodget & Company prior to 1919, and, due to the fact that Exhibits 9 to 12, inclusive, were prepared and issued by Blodget & Company prior to that time, he is not qualified to answer the question.

Mr. Thompson: The City makes the same objection.

A. I can identify these circulars as being circulars that were in the files of Blodget & Company when I was associated with that firm and during the period that I was a partner in the firm.

Mr. Sparks: The Citizens Gas Company moves to strike the answer as not being responsive.

Q. Does your association with Blodget & Company lead you to believe that these circulars were prepared and used in the same manner as the ones which were issued during your association with the firm?

Mr. Thompson: The City objects specially to this question on the ground that it is obvious that the witness can

have no personal knowledge. He is merely asked to express an opinion and conclusion about the matter, of which he knows personally nothing.

Mr. Sparks: The same objection on the part of the Citizens Gas Company.

(Question repeated by stenographer.)

A. All I can say on that is that when I first became identified with the firm, the partners of that firm, who had been members of the firm during this period, told me what their method was of preparing circulars, a method of going back to original sources; that in the preparation of circulars that contained letters from the corporation issuing them, that they would always have a filed copy that was signed by the officer whose name appeared in print; that they retained counsel to pass upon the legality of the proceedings and the issuance of the circulars, the title to the property, and all such legal points of that type.

Mr. Thompson: The City moves to strike out the answer on the ground it is purely hearsay.

Mr. Sparks: The same motion by the Citizens Gas Company.

Q. Referring specifically to the two letters contained in Exhibits 10 and 12, which purport to be copies of letters from Mr. Forrest, do you believe that they are true copies of the originals?

Mr. Thompson: To which the City certainly objects. The belief or opinion of this witness as to whether these are copies or not can mean nothing. If he has any personal knowledge as to whether they are correct or accurate copies, that is one thing, but his belief or opinion means nothing.

Mr. Sparks: The same objection on the part of the Citizens Gas Company.

A. Again, it is only based on belief as to their methods of operation; that I would not have found these circulars carrying Mr. Forrest's signature had they not been signed by Mr. Forrest. I might point out that in the two signed circulars shown here, that they were issued at a time when all original work was done in Boston, and if there is anything available it would be in the remainder of the Boston files.

Mr. Thompson: The City moves to strike out the answer on the ground it shows clearly that the witness has no personal knowledge as to whether the copies of the two letters purporting to have been signed by Mr. Forrest,

contained in Exhibits 10 and 12, are correct and accurate copies of anything written by him.

Mr. Sparks: Let the record show the same motion on the part of the Citizens Gas Company.

Q. Most, if not all, of these circulars contain a reference to the lease from the Indianapolis Gas Company to the Citizens Gas Company, together with the statement that it is a 99-year lease. Did you ever discuss this lease with representatives of the Citizens Gas Company?

A. I did.

Q. Can you state, briefly, the nature of your discussions?

Mr. Sparks: The defendant Citizens Gas Company objects to the witness answering the question unless he is asked specifically as to what representatives he discussed this matter with; also for the reasons heretofore stated to other questions.

Mr. Thompson: The same objection by the City of Indianapolis.

A. When I first visited the company in the Spring of 1920, as I recall the date, I questioned Mr. Forrest, the Secretary and General Manager, with respect to the lease and the location of the property under the leasehold. He showed me maps of the city, where the properties of the Indianapolis Gas Company were located. I visited the plant that had belonged to the Indianapolis Gas Company. I received statements from the company, copies of the minutes of the Board of Directors—

Mr. Higgins: Of which company now; the Citizens Gas Company?

A. (Continued.) Of the Citizens Gas Company. And balance sheets of the Citizens Gas Company, indicating plant additions to the leased property, and the balance sheet would have a statement on the asset side of bonds issued against extensions to the leased property. In fact, I had several conversations with Mr. Forrest with respect to the leasehold property.

Q. Could you be a little more specific in answering as to the nature of the conversations with respect to the leasehold?

A. About what?

Q. The nature of the conversations concerning the leasehold.

A. Oh, questions pertaining to the term of the leasehold, when it was entered into, some of the background of the leasehold property, who the shareholders were,

what the possibilities might be at some date to acquire the stock and merge the two properties.

Q. Did Mr. Forrest state to you that the lease was a 99-year lease?

Mr. Thompson: To which question the City objects because clearly any such statement would be a representation not of fact but of law, and for the additional reason that Mr. Forrest had no power or authority, merely the Secretary and General Manager of the initial trustee, to bind the successor trustee or the municipal corporation of the City of Indianapolis.

Mr. Sparks: As for the Citizens Gas Company, I assume the objections heretofore made will apply to this question and I wish to have them made specifically to this question.

(Question repeated by stenographer.)

A. He did.

Q. In selling the bonds of the Citizens Gas Company and Indianapolis Gas Company, did you consider the duration of the lease, the term of the lease?

A. Did I consider the term of the lease?

Q. Yes.

A. Yes.

Q. Was the existence of this 99-year lease one of the factors bearing upon the sale of the bonds?

A. It did have a bearing on the sale of the bonds.

Q. If you had believed the lease was for less than 99 years, would you have sold the bonds to customers?

Mr. Thompson: We object to that as a mere speculation, having no bearing on the issues involved in this case.

A. The lease running beyond 1952, as I recall it, the maturity date of the bonds, and the indications that the property of the company was useful to the Citizens Gas Company, led me to believe that the 99-year term was of value.

(At this point a recess was taken to 2:15 P. M.)

(Deposition continued at 2:15 P. M.)

Cross-Examination by Mr. Higgins.

Q. Mr. Baker, were the circulars which you have identified as Exhibits 3 to 12, both inclusive, circulars published in the newspapers in New York, or otherwise, by you, or by Blodget & Company?

A. They were printed in duplicate, or multigraphed in duplicate, some of them in New York, others in Boston.

Q. Were they inserted as advertisements in the papers of New York or Boston, if you know?

A. I couldn't tell you offhand.

Q. Now, as to each of these circulars which have been identified as Exhibits 3 to 12, both inclusive, in each instance, before their printing, was the proof sent to Mr. Forrest or some officer of the Citizens Gas Company?

A. I couldn't say that they were in each instance, no.

Q. That was the general practice, however; is that correct?

A. Well, we got out so many different circulars for different purposes. When we bought bonds direct from the company, we would get direct verification, but if we got out what we might call a routine circular in connection with market purchases, why, we would prepare a circular based on previous information we had in our files and based on the previous circulars, and immediately put it out, and then we would send a copy of it to Mr. Forrest.

Q. Was that verification received by you both orally and in writing; orally from Mr. Forrest or some other officer of the company?

A. That phase of it, with these routine circulars, was rather informal. Forrest would be writing a letter that he had received a letter and noted no errors in it, or something of that type.

Q. Were all of the letters to which you referred directed to your own personal attention?

A. Not necessarily so. In the security business, especially in a partnership where the firm name is signed "Blodget & Company," very frequently the receiver of the letter would not know just who had written it. Sometimes I would write to him and sign it personally. Pope would do the same thing.

Q. At any time, either through correspondence or in your numerous conversations which you have already testified to, with Mr. Forrest, did he at any time ever make any corrections as to the facts set out in the circulars which have been introduced in evidence here today; that you remember?

A. I don't remember any specific instances where he has called attention to an error. There may have been some, but it is going back quite a long time to trust your memory on.

Q. Now, when the bonds were delivered to you,

which you purchased directly from the Citizens Gas Company, were any of them delivered to you in person by Mr. Forrest or by any other officer of the Citizens Gas Company?

A. To me in person?

Q. To you or to Blodget & Company.

A. My guess would be that they were sent, according to usual form, in care of a bank, probably the Bankers Trust Company in their case because they had a relationship with the Bankers Trust Company.

Q. But you remember of no instances where he delivered bonds to you in person, bringing them to New York from Indianapolis?

A. Oh, no.

Q. How many visits, approximately, did you have to Indianapolis after your connection with Blodget & Company, if you remember; during the time you were marketing these bonds, both of the Indianapolis Gas Company and of the Citizens Gas Company? Just your best impression.

A. Oh, four to five times during that period.

Q. On those visits, or any one of those visits, did you meet with Mr. Henry H. Hornbrook, who was counsel for the Citizens Gas Company at that time, if you remember it?

A. I met him at lunch once.

Q. Did you meet and have any conversation with Mr. Franklin Vonnegut, who was an officer of the Citizens Gas Company at that time?

A. What is the name?

Q. Mr. Franklin Vonnegut.

A. No, I never met him.

Q. Your dealings, therefore, were primarily with Mr. Effroymsen and Mr. Forrest; is that correct?

A. Yes.

Q. Now, in any conversations which you may have had with either of those gentlemen during your visit in Indianapolis in connection with the purchase of these bonds, did Mr. Forrest at any time tell you anything as to the history immediately preceding the execution of this 99-year lease between the Indianapolis Gas Company and the Citizens Gas Company?

A. I don't recall any.

Q. Do you recall that at any of those conversations when Mr. Forrest was talking about the lease that he advised you, in these words or words to this effect, that the Citizens Gas Company had induced a group of Indian-

apolis citizens to purchase the stock of the Indianapolis Gas Company from outside owners for the purpose of effecting this lease?

Mr. Sparks: The Citizens Gas Company objects to that because it does not tend to prove or disprove any issue in either case.

Mr. Thompson: The City of Indianapolis objects to it on the ground that it is, as to it, hearsay, and that if any attempt is to be made out of such conversation to build up an estoppel against the City of Indianapolis it is ineffectual for that purpose.

(Question repeated by stenographer.)

A. I don't recall that.

Q. You don't recall anything at all in conversation with either Mr. Forrest or Mr. Effroymsen concerning the incidents immediately preceding the execution of the lease, so far as you remember: is that right?

A. No. I said "No" on your previous question. About the only thing I remember was that he spoke of its being an unhealthy situation, with the two companies operating in the same city. That is about all I recall in connection with it.

Q. You recall no conversation in which he stated that the merger, the execution of that lease, was brought about at the insistence of the Citizens Gas Company?

A. In what?

Q. Was brought about at the insistence or suggestion of the Citizens Gas Company.

A. No. I don't recall that.

Q. Did you ever, at any time subsequent to the printing and distribution of these circulars, have any communication from any officer of the Citizens Gas Company, either orally or in writing, advising you or stating that any of the information included in these circulars was not correct?

A. I don't recall any corrections, unless they were minor corrections.

Q. Did you ever have any correspondence or conversations in the distribution of the Indianapolis Gas Company bonds from any officer of the Indianapolis Gas Company?

A. We did not in my time, that I can recall.

Q. And the transactions which you had and by which you secured the Indianapolis Gas Company bonds of which you testified here today were all secured from the Citizens Gas Company; is that correct?

A. Yes.

Q. And all your dealings, then, in the purchase of those bonds were had with the Citizens Gas Company?

A. All of my personal dealings were with the Citizens Gas Company.

Q. And you had no correspondence or no relation at all during that period with any of the officers of the Indianapolis Gas Company; is that correct?

A. I have never met or had any correspondence with any of the officers of the Indianapolis Gas Company.

Q. And all the bonds which you bought were purchased from the Citizens Gas Company; is that right? I don't mean over-the-market bonds.

A. No. I cannot tell you exactly the form of the final delivery, whom the confirmation came from. Forrest negotiated the deal.

Q. Of the Indianapolis Gas bonds?

A. Yes. He negotiated the deal. Now, whether the confirmation was made to the Indianapolis Gas Company, I couldn't tell you.

Q. Have you any information available which would confirm your views on that either one way or the other?

A. I think all of our old books are in Boston. I could find out, by a short telephone call, from our old cashier, whether he had any books here or not.

Q. Well, that is not necessary. Directing your attention particularly to the Exhibit Nos. 10 and 12, which are circulars including the letter purporting to be sent from Mr. Forrest as General Manager of the Citizens Gas Company to Blodget & Company, I will ask you if those circulars, after they were proofed and before they were distributed, if those particular circulars were submitted to Mr. Forrest for his approval or disapproval.

Mr. Sparks: The Citizens Gas Company objects to that because the witness has already stated that he had no connection with Blodget & Company at that time, and so it is perfectly clear that he has no knowledge, or that he does not have sufficient knowledge, to answer this question.

Mr. Thompson: The City makes the same objection.

A. All I can say on that is that knowing of the good business practice that they followed when I became associated with them, that it would be my belief that they had not put out circulars with the names of counsel and Mr. Forrest's name printed on them without first submitting them.

Mr. Thompson: The City moves to strike out the answer on the ground that it is apparent from the answer itself it is only a belief or opinion on the part of the witness and not his personal knowledge as to what actually was done.

Mr. Sparks: The same motion on the part of the Citizens Gas Company.

Q. Can you state, if you know, Mr. Baker, when was the last purchase of bonds of the Indianapolis Gas Company purchased from the Citizens Gas Company?

A. I couldn't tell you offhand, no. I would have to go back to the books to give you the exact date.

Cross-Examination by Mr. Thompson.

Q. It has been more than ten years since Blodget & Company purchased any of the bonds of the Indianapolis Gas Company from the Citizens?

A. Oh, I am quite sure it is more than ten years.

Q. Now, the Indianapolis Gas bonds were due in 1952; is that what you said, Mr. Baker?

A. That is my recollection.

Q. Yes. I think that is right. You recall now that the lease between the Citizens Gas Company and the City of Indianapolis was executed as of September 30, 1913. Do you recall that?

A. Yes.

Q. So that these bonds that you purchased from the Citizens Gas Company were due some thirty-nine years after this lease was executed; is that right?

A. Right.

Q. And one of the things that you mainly relied upon was the fact that the Citizens Gas Company had a lease from the Indianapolis Gas Company of this property for a period of 99 years; is that correct?

A. Right.

Q. Now, did you have a copy of that lease which you examined?

A. I couldn't tell you whether I had actually examined a copy of the lease or not.

Q. Well, did your counsel examine it for you?

A. If so, it was prior to my time.

Q. Well, if you were going to rely upon the terms of the lease, wouldn't it be the most natural thing on the face of the earth that you would want to see what the lease contained?

A. Yes, but my firm had previously bought the bonds and—

Q. With an examination of the lease or without it?

A. Well, it would be reasonable for me to assume that my partners had used proper precautions.

Q. Now I direct your attention, Mr. Baker, to a portion of subdivision 32 of the lease between the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company, and I ask you whether, at the time Blodget & Company made the purchases about which you have testified, you had knowledge of this provision of the lease:

“In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract.”

A. Could I read that?

Q. Yes, sir. I will be very glad to have you do it. It is at the bottom of page 30 and at the top of page 31. What you have here before you is a copy of the bill of complaint of the Chase National Bank, trustee, against the Citizens Gas Company, to which this lease is attached as an exhibit.

A. All I can say on that would be that I assume that this whole lease was available to the counsel of the firm.

Q. There was a red flag of warning, wasn't there, right in that lease?

Mr. Higgins: I object to that.

Mr. Cole: I object also.

Mr. Thompson: It is cross-examination.

Q. There was a red flag of warning, wasn't there, as to the question of whether this lease was valid for a term of 99 years?

A. It would seem so to me.

Q. And I will ask you to state how, with that provision in the lease, you could rely on any representation made to you that the lease was in fact for a period of 99 years.

Mr. O'Connell: I object to the form of the question on the ground it is argumentative and calls for a conclusion of the witness.

A. That indicates a contingent possibility that the lease would not be in effect for 99 years.

Q. And you or your firm knew, presumably, of that

provision in the lease when these bonds were purchased; is that a fact?

Mr. O'Connell: I object to the form of the question on the same grounds.

Mr. Thompson: I will withdraw the question.

Q. Did you or your firm know of that provision in the lease when you purchased the bonds of the Indianapolis Gas Company?

A. I don't remember seeing the notation.

Q. In any event, you made no personal investigation of the terms of this lease before purchasing the bonds?

A. No. I found the lease and all of those things had been passed upon by counsel prior to my connection with the firm.

Q. Now, when were the bonds of the Citizens Gas Company which you purchased due; do you recall, Mr. Baker? Maybe one of these circulars will show it.

A. In 1942 or 1943.

Q. Calling your attention to Plaintiffs' Exhibit 10, do you recall now, Mr. Baker, when those were due?

A. The 5 per cent. bonds were due in 1942, as I remember it.

Q. Now, did you place any reliance, in purchasing those bonds, upon the fact that this lease existed and the Citizens Gas Company would be operating this property in 1942?

A. I knew there was a contingency with respect to who would be the owners of the Citizens Gas Company in 1942, but I did know they were a mortgage on the property.

Q. In determining whether those bonds were a mortgage on the property, did you or your firm examine the franchise of the Citizens Gas Company of Indianapolis?

A. I remember discussing the franchise on various occasions.

Q. Did you know that that franchise contained the following provision:

"When said certificate-holder shall have received, by dividends or otherwise, upon said certificates an amount equal to the face value thereof together with interest thereon at the rate of ten per centum per annum payable semi-annually, then said certificates issued to said subscribers shall be deemed fully paid and cancelled and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to said city, to be owned and oper-

ated or leased by it, and all of the rights, title and interest of said company or its certificate-holders, stockholders, officers, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up."

A. Yes, I recall that.

Q. In other words, you knew that the length of the franchise period extended from 1905 until 1930 and that the franchise under which the Citizens Gas Company of Indianapolis was operating required it to be wound up in 1930, twelve years before these bonds became due?

A. Right.

Q. Did you know also when you relied upon the representations of the Citizens Gas Company in connection with these bonds that the franchise contract contained the following provision? I read from subdivision 22 of the franchise contract:

"If the plant and system of mains of said company shall not have become the property of said city by the cancellation of the certificates of subscribers and conveyance of such property to such city by the board of directors and trustees of said company on or before the expiration of the aforesaid period of said franchise, then said city, by and through its board of public works, upon the expiration of said franchise period, shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated, or owned and leased by it; or, at the option of said city, the board of directors of the corporate successor of the second parties"—that is the Citizens Gas Company—"shall, as heretofore provided, upon the conclusion of said franchise period, mortgage its plant and with the proceeds thereof, or with the mortgage notes issued in proper amounts, pay off and discharge the amount due certificate holders, and thereupon convey said plant to said city subject to such obligations and other legal obligations against said company."

Were you familiar with that?

A. That is as I generally remember it.

Q. Do you remember what was the authorized issue of Citizens Gas mortgage bonds?

A. The total amount authorized?

Q. Yes. Well, I will withdraw that. I don't care

about that. Did you know that on the 9th day of September, 1935, when the property which had been operated by the Citizens Gas Company as initial trustee was transferred to the City, there were outstanding in the hands of the public \$2,745,000 of Citizens Gas Company bonds?

Mr. O'Connell: I object to the question on the ground it is incompetent.

A. I would have no reason to know the exact amount.

Q. Now, as a practical matter—I am asking you now because of your experience and qualifications in the bond business—if there were a mortgage outstanding of approximately \$3,000,000. on the Citizens Gas Company, that company could not have procured the money to pay off these certificate holders.

Mr. O'Connell: I object to the form of the question.

A. That money could not have—

Q. What I am getting at, Mr. Baker, so that you will understand what I have in mind, is this: I have just read to you a provision from the franchise contract between the City of Indianapolis and a man named Potts and others, which was to be assigned to the Citizens Gas Company. Now, in that franchise contract there was the provision which I have read to you, that at the end of the franchise period and at the option of the Board of Public Works of the City of Indianapolis the Citizens Gas Company should mortgage its plant and property for the purpose of procuring money to pay off the certificate holders of the Citizens Gas Company?

A. I remember that.

Q. Now, what I am asking you is, as an expert bond man and investment broker, whether an outstanding mortgage of nearly \$3,000,000. on that property would not have, as a practical matter, prevented compliance with that provision of the contract.

Mr. O'Connell: I object to the form of the question.

A. You have refreshed my memory on that and I remember that some time ago I expressed the opinion that the bonds, for that purpose, as I read it, could not have been sold.

Q. Right.

A. Because it would have been practically a 100 per cent. mortgage on the property.

Q. Correct. Now, in the purchase of these Citizens Gas bonds from the Citizens Gas Company, did you take into consideration that provision which I have just read

to you, which is in subdivision 22 of the franchise contract?

A. That it was a franchise contract—

Q. No. What I mean, Mr. Baker, in purchasing these bonds—I am talking now not about Indianapolis Gas bonds, but I am talking about Citizens Gas bonds—

A. All right.

Q. —you said you relied on certain information which had been furnished to you by the Citizens Gas Company. Now I am asking you did you also take into consideration, in purchasing these bonds of the Citizens Gas Company, this subdivision 22 of the franchise contract which I last read to you?

A. That permitted bonds to be sold for the purchase of the certificates?

Q. Yes. That is what I am talking about.

A. Yes. I had in mind they would be junior obligations to these bonds.

Q. Did you find any authority whatever in the franchise contract of the Citizens Gas Company to issue mortgage bonds for any purpose other than to retire these certificates?

Mr. O'Connell: I object to the form of the question on the ground it calls for a legal conclusion of the witness.

A. Well, what I know about that is that the previous original circular, this Exhibit 10, indicates its legality was passed on by eminent counsel.

Q. And you relied on their opinion?

A. I had to.

Q. As to the legality of the bond issue. Now, do you know, Mr. Baker, whether any of the persons to whom you have sold Indianapolis Gas bonds at the present time own them?

A. That I could not state.

Q. You do not have any knowledge whatever as to whether any present holder of the bonds of the Indianapolis Gas Company has purchased the same from you?

A. No. I can state this, that when this litigation first came to light we recommended to our customers that they sell bonds at market, not because we did not believe in the ultimate value of them, but that there would be a period of litigation and the markets might not be so good.

Mr. Thompson: I have no further questions.

Mr. Sparks: I have no further questions.

Mr. Cole: I don't have any further questions.

By Mr. Higgins:

Q. Mr. Baker, you are not an attorney?

A. No.

Q. And so far as any conclusion which you have drawn from any of the instruments which Mr. Thompson asked you about, either the franchise or the lease, you relied solely upon your counsel's opinion of those matters, did you not?

A. Surely.

Q. You have no information as to how many of your purchasers sold their bonds which they bought from you of the Indianapolis Gas Company, have you?

A. No, I have nothing.

Q. You don't know whether they sold them or not?

A. I recall one case where I think they sold them.

Q. But so far as the others, you have no information? You don't know that they have sold them since they purchased them originally from you?

A. No.

By Mr. Thompson:

Q. And you have no knowledge as to whether they still hold them or not?

A. No.

Q. You just simply don't know anything about it one way or the other?

A. No.

(Discussion off the record.)

Mr. Thompson: It is agreed by all the parties to this cause that it shall be unnecessary for either deponent to sign his deposition and that the same may be received with the same effect as if it had actually been signed.

Mr. Cole: And may I add this further stipulation, that the depositions may be transmitted to the attorney for the plaintiff instead of directly to the court?

Mr. Thompson: Oh, no. I want these filed in court.

Subscribed and sworn to before me this day of, 1939.

Joseph Edwards Baker.

Stenographic charges \$86.25

Postage .66

Payable by Plaintiff.

(PLAINTIFFS' DEPOSITION EXHIBITS 1 AND 2.)

• • • • •
“(Stipulation and notice re taking deposition omitted in printing.)”

(Inserted pursuant to stipulation filed November 22, 1939.)

Indianapolis Gas Company

First Consolidated Mortgage Gold 5% Bonds

Dated October 1, 1902

Due October 1, 1952

Authorized \$7,500,000

Outstanding \$5,351,000

Coupon bonds, denomination \$1,000

Registerable as to principal

Interest payable (April 1 and October 1) at the Equitable Trust Company in New York

TRUSTEES—EQUITABLE TRUST COMPANY, NEW YORK, AND FERDINAND WILSON, INDIANAPOLIS

LEASE The Citizens Gas Company of Indianapolis, in 1913, leased the property of the Indianapolis Gas Company for 99 years at a rental equivalent to the annual bond interest required, and 6% on the \$2,000,000 stock of the latter company. This lease was executed with the approval of the Public Service Commission of Indiana.

HISTORY The Indianapolis Gas Company was formed in 1887 under the name of the Indianapolis Natural Gas Company, to supply the city of Indianapolis with natural gas. The Company enjoyed great prosperity until 1900, paying dividends at the rate of 12%, when the supply of natural gas gave out. From 1900 until 1913, when the Company was leased to the Citizens Gas Company, all surplus earnings went toward the completing of an artificial gas plant and the extension of the distributing system. The Citizens Gas Company of Indianapolis was formed in 1906 to acquire the mains of the Consumers Gas Trust Company, a natural gas concern, which was forced to liquidate through the failure of the natural gas supply. The shares of the Citizens Gas Company were originally sold by popular subscription at par with no allowance for promotion expenses. Over 4,000 citizens of Indianapolis are now holders of this stock. From the time this company was organized in 1906 until 1913 it operated in competition with the Indianapolis Gas Company. The organization of the Indiana Public Service Commission made possible the consolidation of these two companies which was consummated by the lease above described to the advantage of both.

PROPERTY These bonds are secured by a direct first mortgage on all the property owned by the Company, consisting of a modern by-product coke oven plant, a large water gas plant, shops, and mains aggregating 375 miles, valued in excess of \$8,000,000.

BUSINESS The business of the Indianapolis Gas Company and of the Citizens Gas Company, lessee of the property of the former, are operated as a unit and the operations of the plants of the two companies are not separately considered in any of the statements of operation made by the Citizens Gas Company. The Citizens Gas Company supplies without competition the entire city of Indianapolis and adjacent communities, serving a population of over 314,000. On September 1, 1921, it had 66,052 customers. For many years the Citizens Gas Company sold its gas at 55 cents per thousand cubic feet, the cheapest rate in the United States. An increase to 60 cents was authorized by the Public Service Commission in 1919, and recently that Commission has authorized an increase to 90 cents per thousand cubic feet. It is estimated that this will increase the revenue of the Citizens Gas Company by more than \$900,000 per year, yet this rate still remains one of the lowest artificial gas rates in the country. In the past a large proportion of the Citizens Gas earnings have been derived from the sale of coke and its by-products. Earnings in 1921, owing to industrial conditions affecting the coke market, did not make an exhibit comparable to the record of the previous six years. The Company, however, has been able to finance itself very satisfactorily through the sale of preferred stock to its own customers, thus placing a considerable additional equity behind the underlying bonds.

MANAGEMENT The stock of the Citizens Gas Company is perpetually trusted to an honorary board of five representative citizens. These trustees elect the directors and are, therefore, responsible for the management of the Company. This form of control insures a local management at all times.

FRANCHISE The Company operates under an indeterminate permit granted by the Public Service Commission under which the Commission has control of rates and will not allow competition.

EARNINGS Under the terms of the lease the interest on the Indianapolis Gas 5's and 6% on the common stock of the Company is a charge against gross earnings of the Citizens Gas Company before the determination of net earnings applicable to interest charges on the funded debt of that Company.

CAPITALIZATION

| | Authorized | Outstanding |
|--|-------------|-------------|
| CAPITAL STOCK—Common | \$2,000,000 | \$2,000,000 |
| Preferred 7% Cumulative | 2,000,000 | 1,000,000 |
| BONDS—First and Refunding Mortgage 5% | 10,000,000 | 2,738,500 |
| General Mortgage 7% | 1,500,000 | 1,302,000 |

EARNINGS

| | 1916 | 1917 | 1918 | 1919 | 1920 |
|--------------------------|-------------|-------------|-------------|-------------|-------------|
| Gross Operating Earnings | \$3,327,136 | \$4,207,004 | \$4,201,187 | \$4,310,000 | \$4,320,000 |

Plaintiff's Depos

HISTORY

The Indianapolis Gas Company was formed in 1887 under the name of the Indianapolis Natural Gas Company, to supply the city of Indianapolis with natural gas. The Company enjoyed great prosperity until 1900, paying dividends at the rate of 12%, when the supply of natural gas gave out. From 1900 until 1913, when the Company was leased to the Citizens Gas Company, all surplus earnings went toward the completing of an artificial gas plant and the extension of the distributing system. The Citizens Gas Company of Indianapolis was formed in 1906 to acquire the mains of the Consumers Gas Trust Company, a natural gas concern, which was forced to liquidate through the failure of the natural gas supply. The shares of the Citizens Gas Company were originally sold by popular subscription at par with no allowance for promotion expenses. Over 4,000 citizens of Indianapolis are now holders of this stock. From the time this company was organized in 1906 until 1913 it operated in competition with the Indianapolis Gas Company. The organization of the Indiana Public Service Commission made possible the consolidation of these two companies which was consummated by the lease above described to the advantage of both.

PROPERTY

These bonds are secured by a direct first mortgage on all the property owned by the Company, consisting of a modern by-product coke oven plant, a large water gas plant, shops, and mains aggregating 375 miles, valued in excess of \$8,000,000.

BUSINESS

The business of the Indianapolis Gas Company and of the Citizens Gas Company, lessee of the property of the former, are operated as a unit and the operations of the plants of the two companies are not separately considered in any of the statements of operations made by the Citizens Gas Company. The Citizens Gas Company supplies without competition the entire city of Indianapolis and adjacent communities, serving a population of over 314,000. On September 1, 1921, it had 66,052 customers. For many years the Citizens Gas Company sold its gas at 55 cents per thousand cubic feet, the cheapest rate in the United States. An increase to 60 cents was authorized by the Public Service Commission in 1919, and recently that Commission has authorized an increase to 90 cents per thousand cubic feet. It is estimated that this will increase the revenue of the Citizens Gas Company by more than \$900,000 per year, yet this rate still remains one of the lowest artificial gas rates in the country. In the past a large proportion of the Citizens Gas earnings have been derived from the sale of coke and its by-products. Earnings in 1921, owing to industrial conditions affecting the coke market, did not make an exhibit comparable to the record of the previous six years. The Company, however, has been able to finance itself very satisfactorily through the sale of preferred stock to its own customers, thus placing a considerable additional equity behind the underlying bonds.

MANAGEMENT

The stock of the Citizens Gas Company is perpetually trusted to an honorary board of five representative citizens. These trustees elect the directors and are, therefore, responsible for the management of the Company. This form of control insures a local management at all times.

FRANCHISE

The Company operates under an indeterminate permit granted by the Public Service Commission under which the Commission has control of rates and will not allow competition.

EARNINGS

Under the terms of the lease the interest on the Indianapolis Gas 5's and 6% on the common stock of the Company is a charge against gross earnings of the Citizens Gas Company before the determination of net earnings applicable to interest charges on the funded debt of that Company.

CAPITALIZATION

| | Authorized | Outstanding |
|--|-------------|-------------|
| CAPITAL STOCK—Common | \$2,000,000 | \$2,000,000 |
| Preferred 7% Cumulative..... | 2,000,000 | 1,000,000 |
| BONDS—First and Refunding Mortgage 5% | 10,000,000 | 2,738,500 |
| General Mortgage 7%..... | 1,500,000 | 1,302,060 |

EARNINGS

| | 1916 | 1917 | 1918 | 1919 | 1920 |
|---|-------------|-------------|-------------|-------------|-------------|
| Gross Operating Earnings..... | \$3,327,136 | \$4,297,994 | \$5,291,185 | \$5,519,080 | \$8,320,596 |
| Operating Expenses..... | 2,584,850 | 3,668,198 | 4,404,335 | 4,545,430 | 7,315,430 |
| Net Operating Revenue..... | \$742,286 | \$629,796 | \$886,850 | \$973,650 | \$1,205,166 |
| Taxes..... | 105,388 | 115,134 | 148,746 | 258,135 | 314,875 |
| Net Operating Income..... | \$636,898 | \$514,662 | \$738,104 | \$715,515 | \$890,290 |
| Net Non-Operating Income..... | 336,716 | 275,156 | 152,259 | 241,268 | 206,610 |
| Gross Earnings..... | \$973,614 | \$789,818 | \$890,363 | \$956,783 | \$1,096,900 |
| Leasehold Rental..... | 375,402 | 376,892 | 382,936 | 391,357 | 401,405 |
| Net Earnings..... | \$598,212 | \$412,926 | \$507,427 | \$565,426 | \$695,495 |
| Interest and Amortization..... | 114,940 | 122,771 | 151,151 | 295,499 | 280,518 |
| Surplus available for Reserves, Sinking Fund and Dividends..... | \$483,263 | \$290,155 | \$356,276 | \$271,927 | \$414,977 |

594

PLAINTIFFS' DEPOSITION EXHIBIT 4.

Blodget & Co.

34 Pine Street, New York

Telephone John 6310

60 State Street, Boston

Connecticut Mutual Bldg.,
Hartford

First National Bank Bldg., Chicago

\$250,000

Indianapolis Gas Company

First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902

Due October 1, 1952

Authorized: \$7,500,000

Outstanding: \$5,855,000

Coupon bonds in \$1,000 denomination, registerable as to principal. Interest payable April and October 1 in New York.

Guaranteed by the Citizens Gas Company of Indianapolis as to interest and refunding of principal.

The Citizens Gas Company, which leases the property of the Indianapolis Gas Company, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000. The Company operates under an indeterminate permit of the Public Service Commission of Indiana. The property of the Indianapolis Gas Company is leased for 99 years from 1913 for a sum equal to the interest on the outstanding bonds, and 6% on the \$2,000,000 stock of the Indianapolis Gas Company.

Properties consist of by-product coke oven gas plants and adequate distribution systems, as well as water gas plants which are operated in conjunction with the coke oven gas plant as conditions of the coke market and demand for gas require. The properties of the companies are operated as a unit and serve over 69,500 customers.

These bonds are secured by a first mortgage on all the property of the Indianapolis Gas Company now owned or hereafter acquired, consisting of coke ovens and water gas set, with distribution system. This property is valued at a sum in excess of \$8,000,000. The bonds are followed by \$2,000,000 capital stock having a present market value of \$2,140,000 and they are the guaranteed obligations of the Citizens Gas Company whose outstanding preferred and

common stocks have an aggregate market value of \$3,600,000.

| Earnings (Citizens Gas Company) for year ended December 31, 1924 | |
|--|-------------|
| Gross Earnings | \$5,798,436 |
| Operating Expenses & Taxes | 4,179,824 |
| Net Revenue | \$1,618,612 |
| *Leasehold Rental | 418,330 |
| Net Income | \$1,200,282 |
| Bond Interest | 263,300 |

Net earnings, after operating expenses and taxes, are nearly four times the leasehold rental of the Indianapolis Gas Company properties, while earnings after payment of such leasehold rental are over 4½ times interest charges on the funded debt of the Citizens Gas Co.

Price 98½ to yield 5.10% to maturity.

2C5

The Information Contained Herein Has Been Obtained from Sources Which We Consider Reliable But Its Accuracy Is Not Guaranteed.

PLAINTIFFS' DEPOSITION EXHIBIT 5.

(Letterhead—Blodget & Co.)

Boston Chicago Hartford New York

Indianapolis Gas Company
First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902

Due October 1, 1952

Interest payable April 1 and October 1 in New York. Coupon bonds in the denomination of \$1,000; registerable as to principal. Equitable Trust Co., New York, and Ferdinand Winter, Indianapolis, Trustees.

Guaranteed by Citizens Gas Company of Indianapolis as to Interest and Refunding of Principal.

The Indianapolis Gas Company was incorporated in 1890 to supply artificial gas to the city of Indianapolis and

*Leasehold rental includes interest on bonds of Indianapolis Gas Company, as described above, and 6% dividends guaranteed on its \$2,000,000 capital stock.

vicinity. The property of the company is leased for 99 years from October 1913 to the Citizens Gas Company of Indianapolis which now controls the entire gas business of the city of Indianapolis and surrounding communities, serving a population of about 375,000. The Citizens Gas Company operates under an indeterminate permit of the Public Service Commission of Indiana.

The properties consist of by-product coke oven gas plants and adequate distribution systems, as well as water gas plants which are operated in conjunction with the coke oven gas plant as conditions of the coke market and demand for gas require. The properties of the companies are operated as a unit and serve over 69,500 customers.

These bonds, outstanding in the amount of \$6,203,000, are secured by a first mortgage on all the property of the Indianapolis Gas Company now owned or hereafter acquired. The property of the company is valued at a sum in excess of \$8,900,000. These bonds are also guaranteed by the Citizens Gas Company under the terms of the lease which provides for the payment of interest and refunding of the bonds at maturity.

Earnings of Citizens Gas Company of Indianapolis for
Years Ended
December 31

| | 1925 | 1924 |
|-----------------------------------|-------------|-------------|
| Gross Earnings | \$6,504,153 | \$5,798,436 |
| Operating Expenses and Taxes..... | 4,571,549 | 4,179,824 |
| Net Revenue | \$1,932,604 | \$1,618,612 |
| *Leasehold Rental | 418,835 | 418,330 |
| Bond Interest | \$ 212,853 | \$ 260,999 |
| Balance | \$1,300,916 | \$ 939,283 |

Price on Application.

2L6

The Information Contained Herein Has Been Obtained from Sources Which We Consider Reliable But Its Accuracy Is Not Guaranteed.

*Leasehold rental includes interest on bonds of Indianapolis Gas Company, as described above and 6% dividends guaranteed on its \$2,000,000 of Capital Stock.

PLAINTIFFS' DEPOSITION EXHIBIT 6.

(Letterhead—Blodget & Co.)

Boston Chicago Providence Hartford New York

Citizens Gas Company
(Of Indianapolis)

First and Refunding (now First) Mortgage Gold 5s

Dated July 1, 1912

Due July 1, 1942

Callable at 108 on any interest date.

The Citizens Gas Company, which was incorporated in 1907, supplies gas without competition to the entire City of Indianapolis and surrounding communities, serving a population of about 375,000. The Company operates under an indeterminate permit of the Public Service Commission of Indiana.

The Company owns and operates a modern by-product coke oven gas plant, and adequate distribution system. In addition, it has water gas plants which are operated in conjunction with the coke oven plant as conditions of the coke market and demand for gas require. The plant and distribution system of the Indianapolis Gas Company, which are similar to those of the Citizens Gas Company, are leased by the latter and the two systems operated as a unit.

The First and Refunding Mortgage 5% Bonds of the Citizens Gas Company, due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately \$9,000,000. Additional bonds are issuable only under carefully guarded restrictions.

Capitalization.

| | |
|--------------------------------------|--------------------------|
| Citizens Gas Company | Outstanding |
| First & Ref. 5's of 1942 (Authorized | |
| \$10,000,000) | \$3,861,000 ¹ |
| Preferred Stock | 1,000,000 |
| Common Stock | 2,000,000 |

As rental for the properties of the Indianapolis Gas Company, the Citizens Gas Company guarantees the inter-

¹ Including \$514,500 in Sinking Fund.

est on bonds of that company, and also guarantees 6% dividends on its \$2,000,000 Capital Stock.

| | Earnings for years ended June 30, | | |
|-------------------------|-----------------------------------|-------------|-------------|
| | 1926 | 1925 | 1924 |
| Gross Earnings | \$7,014,579 | \$5,837,324 | \$6,332,282 |
| Oper. Exp. & Taxes.... | 5,040,668 | 4,045,268 | 4,692,581 |
| | 1,973,911 | 1,792,056 | 1,639,701 |
| Leasehold Rentals | 418,825 | 418,656 | 417,975 |
| | 1,555,086 | 1,373,400 | 1,221,726 |
| Net Earnings | 193,050 | | |
| Present Bond Interest.. | | | |
| Times earned | 8.06 | 7.11 | 6.33 |

PLAINTIFFS' DEPOSITION EXHIBIT 7.

Citizens Gas Company of Indianapolis Indianapolis Gas Company

The Citizens Gas Company was incorporated in 1907. It operated in competition with the Indianapolis Gas Company until 1913, when it leased for 99 years the plant and distributing system of that company. Since then the two properties have been operated as a unit. The company, operating under an indeterminate permit of the Public Service Commission of Indiana, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000.

Property

The reproduction value of the physical properties of both the Citizens Gas Company and Indianapolis Gas Company as established January 1, 1921, by the engineer of the Public Service Commission of Indiana, plus the cost of subsequent additions, was on March 1, 1922, \$17,680,000. The total outstanding bonded debt of both companies as of May 1, 1922, was only \$10,152,500.

Capitalization
May 1, 1922

| Citizens Gas Company | Outstanding |
|--|--------------|
| First & Refunding Mortgage 5% Bonds, 1942 (authorized \$10,000,000) | \$3,641,500* |
| General Mortgage 7% Bonds, 1923 | 550,000 |
| General & Refunding Mortgage 7% Bonds, 1927 | 450,000 |
| 7% Preferred Stock | 1,000,000 |
| Common Stock | 2,000,000 |
| Indianapolis Gas Company | |
| First Consolidated Mortgage 5% Bonds, 1952 (authorized \$7,500,000) | 5,511,000 |
| Common Stock | 2,000,000 |

As rental for the properties of the Indianapolis Gas Company, the Citizens Gas Company guarantees the interest on the bonds of that company and also guarantees 6% dividends on its \$2,000,000 capital stock.

Earnings

Net earnings, after leasehold rentals, for the last ten years have averaged \$378,911, and for the last six years \$454,911. Interest on all the present outstanding Citizens Gas Company bonds amounts to less than \$250,000.

Besides the increased rate for gas which the company is now enjoying, the improvement in general business is having an appreciable effect. The company is now rapidly liquidating its large stock of coke, an important by-product for which in the past year there was very little market.

Rates

Until May, 1921, the company received only 60c per thousand cubic feet for its gas, which was approximately the cheapest manufactured gas sold in the country. Due to increased cost of labor and supplies, and the industrial depression, the company in the winter of 1920-21 was operating at a loss and in May, 1921, was granted an increase to 90c per M.C.F. On May 15, 1922, the company was granted a temporary injunction by the Federal Court authorizing it to charge \$1.20 per M.C.F. The company states that if this rate, which is fairly comparable to the rates in

* Including present offering.

other cities, had been in effect in 1921, they would have shown a substantial surplus instead of a deficit for that year.

Stock

The common stock was sold at a material premium and is held by about 3,000 citizens of Indianapolis. It is now quoted in Indianapolis at 88%. All the stock is perpetually trusted to a board of five representative citizens. These trustees elect the directors and are therefore responsible for the management of the company. This form of control insures a local management at all times.

The First & Refunding Mortgage 5% bonds of the Citizens Gas Company, due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately \$9,000,000. \$3,641,500 in bonds are outstanding. Additional bonds are issuable only under carefully guarded restrictions.

The First Consolidated Mortgage 5% Bonds of the Indianapolis Gas Company, due October 1, 1952, are secured by a direct first mortgage on all the property of that company. They are further secured by the guarantee of the Citizens Gas Company as to interest and as to refunding at maturity. Additional bonds are issuable only under carefully guarded restrictions.

Blodget & Co.

60 State Street, Boston 34 Pine Street, New York
327 Connecticut Mutual Building, Hartford
705 Widener Building, Philadelphia
First National Bank Building, Chicago

The information and these statistics are not guaranteed, but have been obtained from sources we believe to be accurate.

PLAINTIFFS' DEPOSITION EXHIBIT NO. 8.

Blodgett & Co.
 34 Pine Street, New York
 Telephone John 6310
 Connecticut Mutual Bldg., Hartford
 Widener Building, Philadelphia
 60 State Street, Boston
 First National Bank Bldg., Chicago
 Citizens Gas Company (of Indianapolis)
 Indianapolis Gas Company

The Citizens Gas Company was incorporated in 1907. In 1913 it leased the plant and distributing system of the Indianapolis Gas Co., since which time the two properties have been operated as a unit. The company, operating under an indeterminate permit of the Public Service Commission of Indiana, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000.

Capitalization.

| | Outstanding. |
|---|-----------------|
| Citizens Gas Company | |
| First & Ref. 5s of 1942 (Authorized \$10,000,000) | \$3,848,000 (1) |
| Gen. & Ref. Mortgage 7% Bonds of 1927 .. | 1,000,000 |
| Preferred Stock | 1,000,000 |
| Common Stock | 2,000,000 |
| Indianapolis Gas Co. | |
| First Consolidated 5s of 1952 (Authorized \$7,500,000) | \$5,511,000 |
| Common Stock | 2,000,000 |

As rental for the properties of the Indianapolis Gas Co., the Citizens Gas Company guarantees the interest on bonds of that company and also guarantees 6% dividends on its \$2,000,000 capital stock.

(1) Including \$340,000 in Sinking Fund.

Earnings—12 Months ended December 31, 1923.

| | | |
|----------------------------------|-------------|---------|
| Gross Earnings | \$6,651,765 | |
| Operating Expenses | 4,921,282 | |
| | | <hr/> |
| Net Revenue | \$1,730,483 | |
| Leasehold Rental | 417,767 | |
| | | <hr/> |
| Net Income | \$1,312,716 | |
| Bond Interest | 263,300 | |
| | | <hr/> |
| Balance | \$1,049,416 | |
| Depreciation | \$237,500 | |
| Other Int. and Amortization..... | 61,721 | 299,221 |
| | | <hr/> |
| Surplus for the year..... | \$ | 750,195 |

Net Earnings five times interest charges.

The common stock of the company was sold at a material premium and is held chiefly by citizens of Indianapolis. All the stock is perpetually trusted to a board of representative citizens. These trustees elect the directors and are therefore responsible for the management of the company. This form of control insures a local management at all times.

The First & Refunding Mortgage 5% bonds of the Citizens Gas. Co., due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately \$9,000,000, over 2.3 times the amount of these bonds outstanding. Additional bonds are issuable only under carefully guarded restrictions.

Price 91 and interest, to yield 5.75%.

The First Consolidated Mortgage 5% bonds of the Indianapolis Gas Co., due Oct. 1, 1952, are secured by a direct first mortgage on all the property of that company. They are further secured by the guarantee of the Citizens Gas Co. as to interest and as to refunding at maturity. Additional bonds are issuable only under carefully guarded restrictions.

Price 90 and interest, to yield 5.72%.

The information contained herein has been obtained from sources which we consider reliable but its accuracy is not guaranteed.

Under the Massachusetts new Tax Law of 1916 these bonds are no longer subject to taxation as to principal.
The income only is taxable. This amounts to but \$3.00 on each \$1,000 bond.

INDIANAPOLIS GAS COMPANY

FIRST MORTGAGE 5% GOLD BONDS

Dated October 1, 1902

Due October 1, 1952

EQUITABLE TRUST COMPANY OF NEW YORK, Trustee

Guaranteed by Citizens Gas Company of Indianapolis

CAPITALIZATION

| | Authorized | Issued |
|---|-------------|-------------|
| First Mortgage 5% Gold Bonds, due 1952 | \$7,500,000 | \$5,073,000 |
| Capital Stock (6% dividends guaranteed under lease) | 2,000,000 | 2,000,000 |

These bonds are a first mortgage upon the entire property of the Company. The Indianapolis Gas Company was incorporated in 1890. In October, 1913, with the consent of the Public Service Commission of Indiana, the Indianapolis Gas Company was leased to the Citizens Gas Company for 99 years, whereby the latter company controls the entire gas business of Indianapolis. As a part of the lease, the Citizens Gas Company guaranteed the interest on the Indianapolis Gas Company bonds, their refunding at maturity and 6% dividends on its \$2,000,000 capital stock. This stock is selling in the market at 120, at which it yields about 5%. We are advised that over \$8,000,000 has been put into the Indianapolis Gas Company.

The Company sells gas at 55c per thousand cubic feet, the lowest price for manufactured gas in the United States. The Company makes the best coke, and also makes a good profit from the sale of tar and ammonia. About a year ago a plant was installed to recover benzol, and the first four months the plant paid for itself and is now showing a very handsome profit each month. It is anticipated that within six months this profit will be much increased.

The Company has just completed the installation of a plant to extract cyanide, which is the last by-product in the manufacture of gas, and they have a very profitable long time contract for the sale of all the cyanide which they can manufacture.

The Indianapolis Gas Company's plant is located on one side of the city and the Citizens Gas Company about eight miles away on the other side. The Indianapolis Gas Company has a system of mains amounting to about 375 miles, and a complete new coke oven plant, as well as a water gas and producer gas plant.

EARNINGS

The Citizens Gas Company reports the following earnings for the year ended December 31, 1915:

| | | |
|---|----------------|----------------|
| Gross Earnings | | \$3,061,641.16 |
| Operating Expenses, Taxes, Depreciation, etc. | \$2,319,169.35 | |
| Interest on Indianapolis Gas Co. Bonds | 251,737.50 | |
| Dividends on Indianapolis Gas Co. Stock | 120,000.00 | |
| Miscellaneous | 1,761.12 | 2,692,667.98 |
| Net Earnings | | \$368,973.18 |
| Bond Interest | | 96,049.17 |

For the first ten months of 1916 the Citizens Gas Company showed net earnings, after deducting

Plaintiff

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| Miscellaneous | 1,761.12 | 2,692,667.98 |
| Net Earnings | | \$368,973.18 |
| Bond Interest | | 96,049.17 |

For the first ten months of 1916 the Citizens Gas Company showed net earnings, after deducting operating costs and taxes of \$818,380.55, against \$601,460.47 for the same period last year.

The first charge which the Company makes against these net earnings is the interest on the Indianapolis Gas Company bonds, which amounted to \$211,375 for the same period.

The Citizens Gas Company has \$2,044,000 bonds outstanding and \$1,250,000 capital stock, which is selling from 170 to 180 a share, and is held by over 3,000 stockholders in Indianapolis.

Under the terms of merger all directors and trustees of both companies must always be citizens of Indianapolis, therefore insuring local management.

Price 100 and interest, yielding 5%

While we do not guarantee the foregoing statements we believe them to be accurate and have relied on them in purchasing the bonds for our own account.

BLODGET & CO.

60 State Street, Boston

34 Pine Street, New York

Plaintiff's Deposition Exhibit 9

PLAINTIFF'S DEPOSITION EXHIBIT NO. 10.

Blodget & Co.
60 State Street, Boston
30 Pine Street, New York

Citizens Gas Company of Indianapolis
First Mortgage Sinking Fund Gold 5's

Dated July 1, 1912

Due July 1, 1942

Denomination, \$500 and \$1,000

Principal and semi-annual interest (January 1 and July 1) payable at the office of the Bankers Trust Company, New York. Principal only can be registered.

Callable at 108 and interest on any interest date.

Sinking Fund of $\frac{1}{4}$ of 1% in 1915 and 1916 and $\frac{1}{2}$ of 1% thereafter.

Bankers Trust Co. of New York and
Union Trust Co. of Indianapolis, Trustees.

Full details as to capitalization, earnings, property and business will be found in the accompanying letter of Mr. J. D. Forrest, Secretary and General Manager of the Company, in which the following points may be noted:

First Mortgage on all the property owned by the company, conservatively estimated to have a reproduction value of about three times the par value of the bonds outstanding. Additional bonds can be issued only when the net earnings for the preceding 12 months shall have been equal to twice the interest charges on the bonds outstanding and those proposed to be issued.

Sinking Fund is to be used in purchasing, or calling bonds at 108, and the bonds so purchased are kept alive and draw interest for the fund.

Management. The stock of the company is perpetually trusted with a board of five representative citizens, one appointed by the Mayor and the balance of the board is self perpetuating. They elect the directors and serve without compensation. Because of the quasi public character of the organization a number of leading citizens freely contributed their time to the promotion of the company and the sale of the original issue of stock which was all placed

locally in small amounts to about three thousand investors. The stock is now quoted at about 150%.

Franchise. Company's 25 year franchise can be exchanged at any time for indeterminate permit granted by the Public Service Commission. Lease of the Indianapolis Gas Co. by the Citizens Gas Co. was approved by the Public Service Commission in September, 1913.

Earnings. Net earnings for 1914 more than twice the interest charges on the First Mortgage bonds outstanding for the year and also the \$500,000 to be issued.

Business. The plant is the most modern and efficient in this country. Gas is supplied to the consumer at 55c. per 1000 cubic feet, the lowest price for manufactured gas in the United States, and with one exception the lowest in the world. Its Coke product is of the finest grade and especially adapted for blast furnaces. Coke is shipped as far west as Denver and Anaconda.

Legality approved by Messrs. Spooner & Cotton of New York City and Messrs. Smith, Remster, Hornbrook & Smith of Indianapolis.

Application will be made to list these bonds on the New York Stock Exchange.

Price 96 and interest, yielding 54%.

Blodget & Co.

60 State Street, Boston

30 Pine Street, New York

The Company pays the coupons without deduction for the normal U. S. Income Tax.

March 1, 1915.

Messrs. Blodget & Co.,

60 State Street,

Boston, Mass.

Dear Sirs:

Referring to the recent sale to you of \$500,000 of First and Refunding Mortgage Sinking Fund Gold Bonds of the Citizens Gas Company of Indianapolis, I beg to submit the following information in regard to the property:

The Citizens Gas Company was organized in 1906 for the purpose of buying the mains of the Consumers' Gas Trust Company, a natural gas company which was placed in liquidation by order of court. In return for the agreement of the company to supply the people of Indianapolis with gas at the rate of sixty cents per thousand cubic feet, the city assigned to the company its rights under the

franchise of the Consumers' Gas Trust Company, to acquire the mains of that company. After prolonged litigation in the State and Federal Courts, this system of 133 miles of mains and about 14,000 service pipes was purchased for the sum of \$409,061. A conservative estimate of the reproduction value of this system, lying as it did chiefly under paved streets, was placed at \$1,250,000. The system was found to be in excellent condition and the cost of putting the same into commission was only about \$50,000. Such value as this distribution system had in excess of the cost to the company, has never been placed in the books. The company was financed by selling its stock to the citizens of Indianapolis by popular subscription at par with no payment whatever for promotion expenses. Over three thousand persons purchased the original issue consisting of \$1,000,000 of stock. Since the company has been in operation it has sold \$250,000 additional stock at an aggregate premium of \$104,354.71, which is carried in the surplus of the company and cannot be distributed in dividends. In 1908 \$500,000 of 6% bonds were sold to local interests at 95 and accrued interest, and thereafter \$75,000 additional of these bonds were sold at prices in excess of the original syndicate price. These bonds were called and retired January 1st, 1913. The present First and Refunding Mortgage Sinking Fund Bonds, of which we have sold \$500,000 to you, were authorized as of July 1st, 1912. In July of that year \$420,000 of the new bonds were sold to local interests at 95 and accrued interest, and subsequently during that year \$600,000 additional bonds of the same issue were sold for the purpose of refunding the original First Mortgage Bonds. These were sold at prices ranging from 95 to 98 and accrued interest, the greater portion of them being sold at the latter figure. Of the remaining \$510,000 of bonds of the First and Refunding issue, \$450,000 were sold at 95 and accrued interest during the year 1913 and \$60,000 were sold at par prior to January 1st, 1914. All of the proceeds from the sale of the securities of the company as outlined above have gone into the property, there having been no promotion costs whatever.

In order to induce the people of Indianapolis to invest their savings in the securities of this company, the city agreed in its franchise, that the company should be permitted to pay its stockholders ten per cent dividends, computing the same from the date of issue of the certificate of stock; and further agreed that in the event it should

take over the property, as it is permitted to do under the franchise, it should pay to the stockholders the par value of their stock together with ten per cent cumulative dividends from the date of issue of the certificates. The stock is perpetually Truusted with a Board of five representative citizens, one of whom is appointed by the Mayor (but only when vacancies occur by death or resignation of the original appointee), and the balance of the Board is self-perpetuating. Because of the quasi public character of the organization, a number of leading citizens freely contributed their time to the promotion of the company and the sale of the original issue of stock. Subscriptions were made to the stock by persons who were to become customers of the company, with a view to securing at once an investment and a low price on gas for their own consumption. The spirit of these stockholders and the popularity of the company assured it a good business from the start, which was made in April 1909. By reason of the low price fixed for gas by the franchise, it was necessary for the company to adopt the most economical process of manufacture that could be obtained. This was found to be the by-product coke oven. Fifty such ovens were constructed in the original installation, and were put into commission at the end of November 1909. In 1913 fifty additional ovens were constructed and put into commission. Since the company was organized as a permanent institution in the city, all construction work has always been done in the best possible manner, and the operating results of the company have justified the wisdom of the management in its plans.

By reason of the popular support of the company which secured for it a satisfactory and growing gas business, and by reason of the economical method of production which was employed the company has shown gratifying earnings from the beginning of its operation, and finally, at the beginning of 1913, found itself in a position to acquire the plant and property of The Indianapolis Gas Company, its large and long established competitor. This company had been forced by competition finally to begin the construction of by-product coke ovens. The merger of the two companies was accomplished after prolonged investigation, with the approval of the Public Service Commission on October 1st, 1913. The Citizens Company then took over all of the operating property and business of The Indianapolis Gas Company under a ninety-nine year lease, under which the former agreed to pay as rental the

interest on the First Consolidated Mortgage Bonds of the latter, the amount then outstanding being \$4,833,000, and also to pay six per cent on the \$2,000,000 of Capital Stock of the The Indianapolis Company. This latter payment may increase to a maximum of six and three-quarters per cent, on an ascending slide scale with a decrease in the maximum price of gas to the consumer. The amount of bonds of The Indianapolis Company outstanding has been increased by \$77,000 issued to the treasury of the Indianapolis Gas Company on account of betterments made between the date of the contract for merger and the consummation of the same; and the Citizens Gas Company has in its treasury \$142,000 (to be increased presently to \$163,000) taken down under the terms of the lease and the mortgage on account of betterments made by it to the leased property.

The earnings of the company for the year 1914 and its condition as of December 31st, 1914, are shown on the following Profit and Loss Statement and Balance Sheet:

Income Account—Year 1914.

| | |
|--|----------------|
| Gross Income | \$2,575,025.56 |
| Operating Expenses | 1,929,987.18 |
| Taxes | 59,271.44 |
| Net Revenue | \$ 585,766.94 |
| Interest on Indianapolis Gas Co. 1st 5's..... | 244,537.50 |
| Interest on Indianapolis Gas Co. Stock..... | 120,000.00 |
| Indianapolis Gas Co. Organization Payment and Federal Tax | 652.06 |
| Net Earnings | \$ 220,577.38 |
| First Mortgage Bond Interest | 76,478.89 |

Condensed Balance Sheet—December 31, 1914.

Assets.

| | |
|--|-----------------------|
| Property | \$2,991,677.04 |
| Indianapolis Gas Co. Construction..... | 39,293.18 |
| Indianapolis Gas Co. Treasury Bonds..... | 142,000.00 |
| Inventories—Raw Materials and Supplies.... | 322,567.96 |
| Cash, Notes and Accounts Receivable, Contin- gent, Prepaid and Suspended Accts..... | 419,102.85 |
| | <u>\$3,914,641.03</u> |

Liabilities.

| | | |
|--|----------------|----------------|
| Capital Stock authorized | \$2,000,000.00 | |
| Less Treas. Stock | 750,000.00 | |
| | | <hr/> |
| | | \$1,250,000.00 |
| 1st Mtge. 5% Bonds..... | \$2,025,000 | |
| Less Treas. Bonds | 495,000 | 1,530,000.00 |
| | | <hr/> |
| Five Year Debentures | | 83,000.00 |
| Notes Payable | | 300,000.00 |
| Accounts Payable including Taxes, Interest, Leasehold Rental, Contingent, Accrued and Suspended Accounts | | 280,626.93 |
| Indianapolis Gas Co. Inventory Leasehold Acct. | | 126,900.43 |
| Surplus and Reserves | | 344,113.67 |
| | | <hr/> |
| | | \$3,914,641.03 |

The best evidence of the substantial strength of the company is to be found in the earnings for the year 1914, in the face of the remarkably bad conditions of that year, both for business in general and also for this company to a peculiar degree. The net earnings of \$220,577.38 are more than twice the interest charges on the bonds outstanding at the beginning of the year and also on those which we have just sold to you. The year was one of unusual difficulty for this company. The new by-product coke ovens of the leased plant were not ready for use until the middle of February and were not fully in service until March. Meanwhile the old coal gas plant on the leased property was becoming less and less efficient until finally gas produced from it actually cost more than the company was receiving for gas at the consumer's burner. It was necessary to operate the old plant and also to make a very large amount of water gas in order to supply the city during the period of construction of the by-product coke ovens. Thus for a period of about two months fully one-half of the gas sold in the city was sold at an actual loss. Furthermore the serious business depression set in soon after the operation under the merger began. As a condition to its approval of the merger, the Public Service Commission demanded of the company a reduction of five cents per thousand cubic feet in the price for gas. While this reduction may ultimately lead to a considerable expansion of con-

sumption, it requires some time to bring such a development about, and the business conditions of 1914 were unfavorable to any new development in the industrial uses of gas. The total consumption in 1914 was 2,055,849,500 cubic feet, while the consumption of the combined companies for the calendar year 1913 amounted to 1,928,931,700 cubic feet. Under normal conditions with the growth that has been going on in the city of Indianapolis and with the low price at which gas has been sold, it has been possible to count on an increase in gas sales amounting to over ten per cent per year, but the depression in 1914 made it impossible to maintain that average growth, even with the reduction in price. Therefore the reduction in the price of gas meant a falling off in income of \$102,792 from what the company would have had under the sixty cent rate. This handicap can be overcome in time by the expansion of the business, but the past year was an unfavorable one for any such expansion. At the same time that the loss of income was suffered on account of the terms under which the merger was permitted, the wide-spread general depression, made much more acute by the European War, caused a serious falling off in the demand for coke for metallurgical purposes. The result of this was that the average price at which the company sold its coke during the year 1914 was 51.7 cents per ton less than the price which was obtained in the year 1913. Since the sales for the year amounted to 307,124 tons, this shrinkage in price meant a diminuation in revenue of \$158,783. It is with gratification that I may report that there has been a marked improvement in the coke demand and in the average selling price since the beginning of the present year. All things considered, I feel safe in stating that the normal net earnings of the company under such average business conditions as prevailed between 1907 and 1914 should be at least \$250,000 greater than they were in the year 1914. Having obtained reasonably safe earnings under these very unfavorable conditions, the position of the company may be taken as well assured.

The following statement shows the business of the company for a period of five years ending December 31st, last:

Comparative Earnings.

| | 1914 | *1913 | 1912 | 1911 | 1910 |
|--|----------------|----------------|--------------|--------------|--------------|
| Gross Income. | \$2,577,025.56 | \$1,265,182.48 | \$815,422.96 | \$704,286.38 | \$525,583.74 |
| Operating Ex- penses & Taxes | 1,989,258.62 | 972,185.74 | 647,910.31 | 569,037.31 | 433,570.12 |
| Leasehold Rental | 365,189.56 | 90,412.50 | | | |
| Net Earnings. | \$ 220,577.38 | \$ 202,584.24 | \$167,512.65 | \$135,249.07 | \$ 92,013.62 |

While the exceptionally unfavorable conditions existing during the year 1914 caused a falling off in the net profits available for reserves and dividends, the circumstances above related indicate that the company may anticipate increasingly more favorable returns from its operation. Many large economies have been made possible as the result of the merger, and the company is now in possession of two plants of by-product coke ovens capable of producing sufficient gas to supply the city, while it has well equipped water gas plants which are capable of producing fully as much additional gas as can be obtained from the by-product coke ovens. The company has the entire gas business in a city of 275,000 population, and is well established in its natural markets for coke and by-products. The amalgamation of the working forces of the two companies has been completed, and it is believed that few corporations have more efficient organizations than this one has at the present time. The city is a rapidly growing one and has shown ability and disposition to respond to the low price at which gas is sold.

The bonds of which you have purchased \$500,000 are secured by a mortgage to the Bankers Trust Company as Trustee, under which a maximum of \$10,000,000 is authorized. These bonds were authenticated by the Trustee on account of eighty per cent of the cost of betterments actually made, and only under such conditions may bonds be taken down. They bear interest at the rate of five per cent, payable semi-annually in January and July at the office of the Bankers Trust Company in New York; and during the years 1915 and 1916 a sinking fund of one-quarter of one per cent is operative, increasing to one-half of one per cent thereafter. The sinking fund is to be used in

* From October 1, 1913 the Company operated the Indianapolis Gas Co.'s property as well as its own, and controlled the entire gas business of the city.

purchasing or calling bonds, and the bonds so purchased for the sinking fund shall be kept alive and draw interest for the sinking fund. The bonds mature July 1st, 1942, and may be called, after due notice, on any interest paying date at 108. Bonds are authenticated by the Trustee only when the net earnings for the preceding period of twelve months shall have been equal to twice the interest charges on the bonds outstanding and the new ones for which application is made. These bonds are now a first lien on all the property owned by the company, conservatively estimated to have a reproduction value about three times as great as the par value of the bonds outstanding and those now sold to you.

The franchise from the City of Indianapolis under which the company is operating runs until 1930, and may be surrendered in exchange for an indeterminate permit from the Public Service Commission. However, some special safe-guards of the franchise are deemed sufficient reason for continuing to operate under it instead of the indeterminate permit.

The legal status of the company and the validity of these bonds have been examined and approved by Messrs. Spooner & Cotton of New York, and Messrs. Smith, Remster, Hornbrook & Smith of Indianapolis.

Very truly yours,

J. D. Forrest,
Secretary and General Manager.
Citizens Gas Company of Indianapolis.

• • • • • •
(Plaintiffs' Deposition Exhibits 11 and 12 omitted pursuant to stipulation filed Nov. 22, 1939.)

1063 (Further Entry for November 16, 1939.)

For satisfactory reasons appearing to the Court the time for filing the record in this case with the Circuit Court of Appeals for the Seventh Circuit and for docketing the action there, pursuant to the appeal sued out, is extended to and including the 5th day of December, 1939.

1064 PLAINTIFFS' EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Consolidated Caption—1844 and 1950.) • •

STIPULATION.

It is hereby stipulated by all the parties to these two causes that for the purposes of the trial of these causes the following facts are true, that this Stipulation, when introduced in evidence, may be received and accepted as establishing the facts stipulated, and that each of the exhibits herein referred to may be received in evidence as if duly proved, without objection to the fact that the original has not been produced or offered, and without proof of its execution or authenticity.

The right is reserved to any party to this Stipulation at the trial of these causes:

1065 (a) To object to the admission in evidence of any part of this Stipulation or any exhibit hereto attached or referred to herein on any ground other than that such exhibit or such part of this Stipulation is not the best evidence or is otherwise not properly or sufficiently proved.

(b) To introduce such further evidence, not contradictory of facts herein stipulated, as such party may desire, this Stipulation not being intended to include all of the evidence in either of these causes.

(c) To introduce any evidence explaining or supplementing the facts herein agreed to which is competent, relevant, and material.

1. (a) Plaintiff (in cause 1844), The Chase National Bank of the City of New York, is a corporation established and existing under and by virtue of the banking laws of the United States, with its principal place of business located in the City of New York in the State of New York, and is engaged in and authorized to engage in a general banking

and trust business. It is a resident and citizen of the State of New York.

(b) In cause 1950: Plaintiff Massachusetts Mutual Life Insurance Company is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Massachusetts, is a resident and citizen of the Commonwealth of Massachusetts, and has its principal place of business in Springfield, Massachusetts. Plaintiff New England Mutual Life Insurance Company is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Massachusetts, is a resident and citizen of the Commonwealth of Massachusetts, 1066 and has its principal place of business in Boston, Massachusetts. Plaintiff The Savings Bank of Baltimore is a corporation duly created and existing under and by virtue of the laws of the State of Maryland, is a resident and citizen of the State of Maryland, and has its principal place of business in Baltimore, Maryland.

(c) Each of the defendants The Indianapolis Gas Company (hereinafter called "Indianapolis Gas") and Citizens Gas Company of Indianapolis (hereinafter called "Citizens Gas") is a corporation duly created and existing under the laws of the State of Indiana, with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

(d) Defendant City of Indianapolis (hereinafter sometimes called the "City") is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District of Indiana, Indianapolis Division.

(e) Defendants Thomas D. Sheerin, A. Dallas Hitz, _____, Edward W. Harris, and Charles S. Rauh, are members of the Board of Trustees for Utilities of the City of Indianapolis, and each of them, both individually and as a member of said Board, is a resident of the City of Indianapolis and a resident and citizen of the State of Indiana.

(f) Defendants Henry L. Dithmer, Brodehurst Elsey, Roy Sahn, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer are members of the Board of Directors for Utilities of the City of Indianapolis, and each of them, both individually and as a member of said Board, is a resident of the City of Indianapolis and a resident and citizens of the State of Indiana.

1067 (g) Defendant (in cause 1950) The Indiana National Bank of Indianapolis is a corporation estab-

lished and existing under and by virtue of the banking laws of the United States, with its principal place of business located in the City of Indianapolis, State of Indiana, and is a resident and citizen of the State of Indiana and of the Southern United States Judicial District of the State of Indiana, Indianapolis Division.

2. The amount in controversy in each of these causes exceeds, exclusive of interest and costs, the sum or value of \$3,000.

3. (a) There are now issued and outstanding in the hands of the public "First Consolidated Mortgage Five Per Cent Gold Bonds" of Indianapolis Gas (hereinafter called the "Bonds"), secured by the Mortgage hereinafter described, in the aggregate principal amount of \$6,881,000 (which includes the \$120,000 principal amount and the \$18,000 principal amount of Bonds held by Indianapolis Gas and the City, respectively, as hereinafter more fully set forth). Each of said Bonds and the coupons attached thereto are in the form set forth in the Mortgage, a copy of which, marked "Exhibit A", is attached to the Bill of Complaint in each of these causes. Of said Bonds in the aggregate principal amount of \$6,881,000, Indianapolis Gas now holds \$120,000 principal amount and the City now holds \$18,000 principal amount.

(b) Said Bonds in the principal amount of \$120,000 held by Indianapolis Gas were acquired as follows:

1068 By agreement between Citizens Gas and Indianapolis Gas \$77,000 principal amount of Bonds, authenticated by the Trustee on June 22, 1914, were given to Indianapolis Gas on August 25, 1914, in payment for certain capital improvements made by Indianapolis Gas to said Indianapolis Gas property between March 1, 1912, and September 30, 1913, all upon petition to and order of the Public Service Commission of Indiana made and entered on August 25, 1914. Indianapolis Gas sold \$22,000 principal amount of said Bonds but has retained the balance of \$55,000.

Bonds in the principal amount of \$50,000 were purchased by Indianapolis Gas on February 15, 1916, at a cost of \$47,075.

Bonds in the principal amount of \$15,000 were purchased by Indianapolis Gas on September 18, 1919, at a cost of \$13,350.

Said Bonds have been held by Indianapolis Gas continuously since the respective dates of such acquisition and bear the following serial numbers: 17, 18, 23, 24, 204, 708,

709, 748, 911, 1046, 1047, 1494, 1783, 2014 to 2038, both inclusive, 2080 to 2089, both inclusive, 2508, 2852 to 2856, both inclusive, 3867, 3868, 3869, 3897, 3898, 4104, 4105, 4106, 4345, 4379, 4818, 5094 to 5148, both inclusive. Said Bonds are now pledged with The Indiana National Bank of Indianapolis as collateral to secure the payment of certain indebtedness of Indianapolis Gas to it in the sum of \$28,700. All interest coupons on the above Bonds payable subsequently to the time said Bonds were so acquired by Indianapolis Gas and up to and including those payable April 1, 1935, were paid directly to Indianapolis Gas by Citizens Gas. No interest has been paid on said Bonds since April 1, 1936.

1069 (c) Said Bonds in the principal amount of \$18,000 now held by the City of Indianapolis were acquired by Citizens Gas in March, 1932. Said Bonds were held continuously by Citizens Gas until their transfer to the City of Indianapolis on September 9, 1935, and said Bonds are now held by the City and bear serial numbers 6864 to 6881, both inclusive.

(d) The plaintiffs (in cause 1950) Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, and The Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of Bonds, together with all interest coupons for October 1, 1936, and thereafter, attached, viz: \$265,000, \$150,000, and \$163,000.

(e) Plaintiff, Massachusetts Mutual Life Insurance Company, purchased \$100,000 principal amount of Bonds on March 13, 1925, at a price of \$980 per \$1,000 Bond, and purchased \$165,000 principal amount of Bonds during the months of March and May, 1931, at prices ranging from \$1,020 to \$1,025 per \$1,000 Bond. All of said Bonds have been held continuously by Massachusetts Mutual Life Insurance Company since the time of purchase, are now held by it, and have the following serial numbers: 548, 781, 782, 1001, 1007, 1038, 1151, 1171, 1385, 1401, 1402, 1451, 1618, 2043/7, 2150/2, 2317, 2409, 2486, 2620, 2621, 2726, 2727, 2780/3, 2827, 2955, 3012, 3013, 3019 29, 3076, 3113/15, 3130, 3131, 3473, 3474, 3861, 4039, 4097, 4276, 4301/3, 4399, 4521, 4552, 4553, 4557, 4607, 4691, 4692, 4725, 4726, 4788, 4830, 4899, 4900, 4906, 4907, 4935, 4976, 5153, 5172, 5188, 1970 5281, 5477/80, 5482/84, 5544, 5545, 5559, 5570/3, 5607, 5608, 6285/300, 6310/21, 6324/6, 6385/415, 6466/84, 6545/59, 6676/97, 6701/34, 6793/805. Plaintiff, New England Mutual Life Insurance Company, purchased \$100,-

000 principal amount of Bonds on July 14, 1916, at a price of \$970 per \$1,000 Bond and purchased \$50,000 principal amount of Bonds during August, 1931, at a price of \$1,027.50 per \$1,000 Bond. All of said Bonds have been continuously held by New England Mutual Life Insurance Company since the time of purchase, are now held by it, and have the following serial numbers: 1008/20, 1136/50, 1299/1314, 1317/22, 1323/36, 1445/50, 1551/4, 2487, 2875/8, 3205/17, 3782/9, 4381/3, 4439, 4485/90, 4873/6, 4917, 5178/87, 6255/79. Plaintiff, The Savings Bank of Baltimore, purchased \$163,000 principal amount of Bonds during the years 1924, 1925, 1927 and 1928, at a total cost of \$163,205.00. All of said Bonds have been continuously held by The Savings Bank of Baltimore since the time of purchase, are now held by it, and have the following serial numbers: 452, 470, 550/4, 561, 809, 810, 872/5, 961, 1061, 1082, 1059/9, 1111, 1121, 1154, 1163, 1386/7, 1394, 1400, 1411, 1413, 1465, 1490/2, 1614, 1767, 2008/9, 2112/3, 2490/1, 2529/32, 2535, 2557/76, 2768, 2869, 3036/8, 3074, 3096, 3105/9, 3259/60, 3317, 3337, 3467/8, 3726/7, 3870, 3880/2, 4154, 4159, 4185/9, 4444/5, 4527/8, 4573/4, 4609/10, 4646/8, 4734/8, 4997/5020, 5024/5, 5051, 5076, 5274, 5292, 5459, 5461/2, 5466, 5513/7, 5519/21, 5561, 5588, 5621 and 5826/7.

1071 (f) The last coupons attached to said Bonds which have been paid were those falling due on April 1, 1936. When said coupons due April 1, 1936, were paid coupons were presented for payment by and payment was made to more than 940 individual bondholders and 210 corporate bondholders. The bondholders so presenting said coupons resided in 30 different states, in the District of Columbia, and in 5 foreign countries. The coupons so presented by said 940 individual and 210 corporate bondholders did not include all of the coupons due April 1, 1936, on the outstanding 6,881 Bonds, and coupons due April 1, 1936, in the total sum of \$775, have not yet been presented for payment.

4. (a) On or about the 1st day of October, 1902, Indianapolis Gas executed its certain Mortgage Deed of Trust (referred to herein as the "Mortgage") to The Trust Company of America, a banking corporation then existing and doing business in the City of New York, and one Ferdinand Winter, a citizen of the City of Indianapolis, Indiana, as trustees to secure the payment of the principal and interest of the Bonds, which were authorized to be issued in the total principal amount of \$7,500,000. Said Mortgage was duly recorded.

(b) The Trust Company of America at the time of the execution of the Mortgage and at all times thereafter up to and including February 24, 1912, was duly authorized 1072 and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts thereby created and was until February 24, 1912, the duly acting and qualified corporate trustee under said Mortgage. On February 24, 1912, the Trust Company of America was duly merged, pursuant to the laws of New York with The Equitable Trust Company of New York. Said The Equitable Trust Company of New York was on February 24, 1912, and at all times thereafter up to and including May 31, 1930, duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said Mortgage and became and was until May 31, 1930, the duly acting and qualified corporate trustee under said Mortgage. On May 31, 1930, The Equitable Trust Company of New York was duly consolidated with The Chase National Bank of the City of New York (plaintiff in cause 1844), which was on May 31, 1930, and has been at all times thereafter duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said Mortgage and was on May 31, 1930, and has been at all times thereafter the duly qualified and acting corporate trustee under said Mortgage.

(c) Said Ferdinand Winter died in March, 1935, and since his death plaintiff (in cause 1844) The Chase National Bank of the City of New York (hereinafter referred to as the "Trustee") has been continually and is now the sole trustee under said Mortgage. A correct copy of said Mortgage, marked "Exhibit A", is attached to the Bill of Complaint in each of these causes.

1073 5. (a) On September 30, 1913, Indianapolis Gas executed and delivered to Citizens Gas a certain written instrument of lease (hereinafter called the "Lease"). A correct copy of said Lease, marked "Exhibit B", is attached to the Bill of Complaint in each of these causes. All the property leased by Indianapolis Gas to Citizens Gas by said Lease of September 30, 1913, (Exhibit B) was covered by and included in the Mortgage.

(b) On September 30, 1913, the property of Indianapolis Gas included a plant for making and distributing gas to consumers in the City of Indianapolis, including about 375 miles of mains located in the streets and alleys of the City, which mains were connected with the meters of more than 41,000 customers who were served thereby.

6. (a) Citizens Gas was organized in 1906 under the general laws of Indiana providing for the incorporation of manufacturing and mining companies. Certain instruments pertaining to the creation and operations of Citizens Gas are as follows:

(I) A certain franchise contract, and all amendments thereto, signed and entered into on August 25, 1905, and finally approved by the City on August 30, 1905, by and between the City and Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt. On May 24, 1906, said franchise contract was duly assigned by the grantees therein named to Citizens Gas. Amendments to said franchise contract were approved by the Common Council of the City of Indianapolis on May 22, 1912. Correct copies of said franchise contract, the assignment thereof, and all amendments thereto, are attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as Exhibit C.

(II) The Articles of Incorporation of Citizens Gas and all amendments thereto. Correct copies of said Articles of Incorporation, and all amendments thereto, are attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as Exhibit D.

(III) The By-Laws of Citizens Gas and all amendments thereto. A correct copy of said By-laws, and all amendments thereto, is attached to the Bill of Complaint in cause 1844 as part of Exhibit C.

(b) Citizens Gas operated under the terms of said franchise contract, and the amendments thereto, from the date of the assignments thereof until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit, with the result that from August 27, 1921, until September 9, 1935, it operated as a public utility under an indeterminate permit. Said surrender and the acceptance of said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise contract in so far as they created a public charitable trust and defined the terms and conditions thereof and the rights, duties, and liabilities of Citizens Gas as original trustee, of the City as successor trustee and of the inhabitants of Indianapolis as the beneficiaries of said trust.

1075 (c) On September 9, 1935, Citizens Gas transferred its gas producing and distributing plant and system to the City and since then the City has operated said gas

producing and distributing plant and system. Since September 9, 1935, Citizens Gas has not been engaged in any business of any nature whatsoever.

7. (a) On or about May 21, 1913, Indianapolis Gas, lessor, and Citizens Gas, lessee, jointly submitted a tentative form of lease to the Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and execute said lease. Subsequently, one Frank S. Fishback filed with said Public Service Commission an intervening petition in which he objected to the granting of said joint petition of said gas companies.

(b) A correct copy of the Finding and Order of said Commission with respect to said Lease of September 30, 1913, is attached to the Bill of Complaint in each of these causes, marked "Exhibit D" in cause 1844 and "Exhibit E" in cause 1950.

(c) The proposed lease was so changed and modified as to comply with the provisions and conditions required by the Finding and Order of the Public Service Commission (Exhibit D in cause 1844 and Exhibit E in cause 1950), and thereafter the proposed Lease as so changed and modified was submitted to a meeting of the stockholders of Indianapolis Gas and at said meeting, which was attended by the holders of more than three-fourths of the outstanding capital stock of said company, the execution of said modified Lease was unanimously authorized and approved.

(d) At a meeting of the Board of Directors of Citizens Gas, duly called and held on February 26, 1913, certain 1076 actions were taken by said Board, as shown by the minutes of said meeting, a correct copy of which is attached to this Stipulation marked "Exhibit 5". On the same date and following said meeting of the Board of Directors a meeting of the Board of Trustees of Citizens Gas was duly called and held. The action of said Board of Trustees is shown by the minutes of said meeting, a correct copy of which is attached to this Stipulation marked "Exhibit 6".

(e) At a meeting of the Board of Trustees of Citizens Gas, duly called and held, the execution of said modified Lease was unanimously authorized and approved by said Trustees. The respective Boards of Directors of Indianapolis Gas and Citizens Gas also duly authorized and approved the execution of said modified Lease. Correct copies of the minutes of the meetings of the Board of Trustees of Citizens Gas, of the Board of Directors of Citizens

Gas, and of the Board of Directors of Indianapolis Gas, approving the execution of said modified Lease, marked "Exhibit 7", "Exhibit 8" and "Exhibit 9", respectively, are attached to this Stipulation. Thereupon said Lease as thus changed and modified was executed by the respective officers of said companies and was submitted to the Public Service Commission, which Commission as part of said Finding and Order (Exhibit D in cause 1844 and Exhibit E in cause 1950) approved said Lease as thus changed and modified and ordered that it be spread upon the records of the Commission. Said Lease as so modified and executed is the same Lease hereinbefore referred to, 1077 a copy of which, marked "Exhibit B", is attached to the Bill of Complaint in each of these two causes. The parties to said Lease have complied with all the provisions and conditions set forth in said Finding and Order of the Public Service Commission which were conditions precedent to the approval of said Lease by the Commission.

(f) On or shortly after September 30, 1913, said Lease was recorded in the office of the Recorder of Marion County, Indiana, in Volume 78, page 257 and following, of the Miscellaneous Records of said office.

8. (a) Immediately after November 28, 1913, Citizens Gas took possession and control of the gas plant and system and all the other property of Indianapolis Gas described in said Lease, all of which property was and is covered by said Mortgage. Citizens Gas thereafter and until September 9, 1935, continued to operate the plant of Indianapolis Gas and to supply with gas the customers whose meters were connected with the mains of Indianapolis Gas.

9. (a) On November 28, 1913, the aforesaid Frank S. Fishback, who was a resident freeholder of the City of Indianapolis and a stockholder of Citizens Gas, commenced a suit in equity in the Circuit Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas and Indianapolis Gas, in which suit the City of Indianapolis was subsequently made a party defendant. Attached hereto is a correct copy of the first paragraph of complaint in said suit, omitting the parts stricken out on motion of some of the defendants, identified as "Exhibit 13" to this Stipulation. The plaintiff in said suit filed nine additional paragraphs of complaint, designated respectively as the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth para-

graphs of complaint. Each of said amended second to tenth paragraphs of complaint, inclusive, was substantially identical with said first paragraph of complaint (Exhibit 13), except that each of said amended second to tenth paragraphs of complaint, inclusive, contained in addition to the allegations of the first paragraph of complaint the respective additional allegations set forth in Exhibit 14 to this Stipulation. Said suit was transferred to the Superior Court of Marion County, Indiana, for determination. All the defendants therein were served with process and appeared generally in said suit.

(b) Three of the defendants in said cause, viz.: Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas, filed a demurrer to each of the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the plaintiff's complaint. Said demurrer of the Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas was sustained by the court.

(c) The City did not file a demurrer to any paragraph of the complaint or amended complaint in said cause, but filed an answer of general denial to all paragraphs thereof. Three of the defendants in said cause, viz., Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas, filed a joint amended answer to the complaint (first paragraph). The plaintiff demurred to said amended answer on the ground that said amended answer did not state facts sufficient to constitute a defense to plaintiff's complaint, which demurrer was overruled.

(d) Before said action in equity brought by said Frank S. Fishback came on to be heard, the City, through its Board of Public Works, required extensions to be made in the lines and mains of Indianapolis Gas, as provided in said Finding and Order of the Public Service Commission (Exhibit D in case 1844 and Exhibit E in cause 1950) and in subsection 6 of Section 27½ of said Lease.

1079 (e) On February 15, 1921, the Superior Court of Marion County, Indiana, entered final judgment in said action which judgment was in the words and figures following:

"Come now the parties and the plaintiff now dismisses this action as against the defendant, City of Indianapolis, upon which dismissal the court now renders judgment for costs against the plaintiff.

"And the demurrer of the plaintiff to the amended answer of the defendants, Public Service Commission of In-

diana, Citizens Gas Company and Indianapolis Gas Company, having been overruled, and the demurrer of said defendants to the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of complaint having been sustained and the plaintiff failing and refusing to plead further either by way of reply to such amended answer, or amendment to his complaint, but elects to stand upon such complaint and abide the ruling of the court upon such demurrers, judgment is now rendered in favor of the defendants, Public Service Commission of Indiana, Citizens Gas Company, and Indianapolis Gas Company, upon the demurrer of plaintiff to their amended answer and upon their demurrer to the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of complaint.

"It Is Therefore Ordered, Adjudged, and Decreed by the Court that the plaintiff take nothing by this action, and that the defendants recover of and from plaintiff their costs herein laid out and expended in the sum of \$, to which judgment the plaintiff at the time objects and excepts."

(f) After the City had been dismissed as a party defendant in said cause it was not again made a party thereto.

(g) Neither the Trustee nor any predecessor trustee under the Mortgage, nor any bondholder of said Indianapolis Gas was a party plaintiff, party defendant or intervener in said cause of Frank S. Fishback *vs.* Public Service Commission, et al. The only persons or corporations who were parties to said cause are those hereinbefore named in this subdivision of this Stipulation.

(h) Thereafter the plaintiff in said cause, Frank S. Fishback, prayed an appeal to the Supreme Court of Indiana. Said appeal was dismissed by said Supreme 1080 Court on March 8, 1923, and a rehearing was denied the appellant therein on May 31, 1923. The opinion of the Supreme Court in dismissing said appeal is reported in *Fishback v. Public Service Commission, et al.*, 193 Ind. 282, 138 N. E. 346, and the opinion of the Supreme Court in denying a rehearing is reported in *Fishback v. Public Service Commission, et al.*, 193 Ind. 282, 139 N. E. 449.

(i) The final judgment of the Superior Court of Marion County, Indiana, in said case of Frank S. Fishback *vs.* Public Service Commission, et al., has never been modified, reversed, vacated or set aside, but said judgment is now in full force and effect.

(j) The pleadings referred to and described in this subdivision of this Stipulation in said cause of Frank S. Fishback *vs.* Public Service Commission of Indiana, et al., were the only pleadings filed in said cause.

10. (a) At the date of the execution and delivery of the Lease \$4,833,000 total face amount of Bonds were outstanding—which Bonds bore serial numbers One (1) to Four Thousand Eight Hundred and Thirty-three (4,833) both inclusive. From time to time between June 22, 1914, and February 11, 1932, upon the request of Indianapolis Gas, the Mortgage trustee authenticated and delivered to Indianapolis Gas additional Bonds in the total principal amount of \$2,048,000 which Bonds bore serial numbers Four Thousand Eight Hundred Thirty-four (4,834) to Six Thousand Eight Hundred Eighty-one (6,881) both inclusive. Pursuant to the provisions of the Lease, Indianapolis Gas in turn delivered \$1,971,000 principal amount of said additional Bonds to Citizens Gas for the purpose of reimbursing Citizens Gas for ninety per cent (90%) of its capital expenditures on account of extensions and betterments to the plant and system of Indianapolis Gas made and paid for by Citizens Gas. As a result of 1081 such expenditures for extensions and betterments and the reimbursement by issuance of Bonds as just stated, Citizens Gas has expended for additions and betterments to the plant of Indianapolis Gas approximately \$200,000 for which it has received no reimbursement. All additions and betterments to the plant of Indianapolis Gas for which Bonds were issued were made with its consent, and under the terms of said Lease all said additions and betterments became and are the property of Indianapolis Gas. All of said Bonds in the principal amount of \$1,971,000 were sold by Citizens Gas, except the Bonds in the principal amount of \$18,000 referred to in subdivision 3 (c) of this Stipulation, and the proceeds were retained by it.

11. (a) Citizens Gas operated the plant and property of Indianapolis Gas under said Lease continuously from and after November 28, 1913, until September 9, 1935. During the period from October 2, 1913, until September 9, 1935, Citizens Gas from time to time duly paid the interest on the outstanding Bonds by making payment thereof to the holders of Bonds, either at the office of the Mortgage trustee or directly to the holders of Bonds themselves. During said period Citizens Gas paid all the rentals payable in cash under the terms of the Lease, and also

paid all the taxes required to be paid by the lessee under the terms of the Lease.

(b) The total payments made by Citizens Gas as interest on Bonds of Indianapolis Gas, dividends on stock of Indianapolis Gas, taxes due from Indianapolis Gas and corporate organization maintenance fees to Indianapolis Gas, during the period from October 1, 1913, to September 9, 1935, are shown by Exhibit 20 attached to this Stipulation.

(c) During the period from its organization in 1082 1906 to June 30, 1935, Citizens Gas paid dividends to the holders of its common stock at the rate of 10% per annum. On September 9, 1935, when Citizens Gas conveyed, transferred and assigned its property to the City, it turned over \$410,929.64 in cash or current funds to the City.

12. (a) On March 20, 1929, the City of Indianapolis, through its Board of Public Works, adopted a resolution, a correct copy of which, marked "Exhibit 22", is attached to this Stipulation.

(b) On April 3, 1929, the Board of Directors of Citizens Gas, after receiving the resolution of the City above referred to (Exhibit 22), unanimously adopted two resolutions, true copies of which, marked "Exhibit 23", and "Exhibit 24", respectively, are attached to this Stipulation. On April 3, 1929, the Board of Trustees of Citizens Gas unanimously adopted a resolution approving each of said resolutions of the Board of Directors (Exhibits 23 and 24).

13. (a) On April 30, 1929, one Newton Todd, a stockholder of Citizens Gas, commenced an action in the United States District Court for the Southern District of Indiana, Indianapolis Division, being cause 1191 in Equity on the dockets of said Court, seeking to enjoin Citizens Gas from transferring its property to the City. A correct copy of the bill of complaint in said cause, marked "Exhibit 30", is attached to this Stipulation. All the defendants in said cause were duly served with process, appeared generally, and filed their answers to plaintiff's bill of complaint.

(b) A correct copy of the separate and several answer to plaintiff's bill of complaint in said cause of the following named defendants, viz: City of Indianapolis; L. Ert 1083 Slack, as Mayor of said City; William A. Boyce, Jr., as City Clerk of said City; and Theodore H. Dam-meyer, John C. McCloskey and Emsley W. Johnson, as and constituting the Board of Public Works of said City; marked "Exhibit 31", is attached to this Stipulation.

(c) The following defendants in said cause, viz: Citizens Gas; Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, and Henry Kahn, individually, and as voting trustees of the common stock of Citizens Gas; John R. Welch, Gustav A. Efroymsen, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Fooker, Franklin Vonnegut, James I. Dissette, and Edgar H. Evans, filed their separate and several answer to plaintiff's bill of complaint, which answer was substantially identical with the answer of the City of Indianapolis, et al. (Exhibit 31).

(d) Plaintiff in said equity cause No. 1191 filed an amended motion to strike out portions of said answer of the City, et al. (Exhibit 31). A correct copy of said amended motion, marked "Exhibit 32", is attached to this Stipulation. Said plaintiff also filed an amended motion to strike out portions of said answer of Citizens Gas, et al., which amended motion was substantially identical with the amended motion to strike out portions of the answer of the City, et al. (Exhibit 32). Said amended motions were overruled by the District Court of the United States for the Southern District of Indiana on February 26, 1930.

(e) During the pendency of said cause certain of the defendants named in plaintiff's bill of complaint died and certain of the other defendants ceased to occupy their respective official positions as officers of the City. On the 5th day of May, 1930, the following substitution of parties was made:

1084 Henry O. Goett, as City Clerk of the City of Indianapolis, in lieu of William A. Boyce, Jr.; E. Kirk McKinney, Louis G. Brandt and Charles O. Britton, as and constituting the Board of Public Works of said City, in lieu of Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson; Frank C. Dailey, and Otto Lieber, individually and as voting trustees of Citizens Gas, in lieu of Lucius B. Swift and Robert Lieber; and Reginald H. Sullivan, as Mayor of the City of Indianapolis, in lieu of L. Ert Slack. Said substituted parties adopted as and for their respective answers in said cause the answers theretofore filed by the persons for whom they were substituted as defendants.

(f) On April 19, 1930, plaintiff filed a supplemental and ancillary bill of complaint in said cause making Allen G. Williams, William V. Rooker, Seth S. Ward and John F. Robbins parties defendant therein. No answer was filed by said defendants but on April 30, 1930, a stipulation was entered into by all the parties to said cause, including

said defendants, by the terms of which stipulation it was agreed in open court that a certain action then pending in the Superior Court of Marion County, Indiana, (which action is more fully described in subdivision 14 of this Stipulation) would not be prosecuted or any further steps taken therein until the final determination of said equity cause No. 1191. Said Allen G. Williams was the same Allen G. Williams who was plaintiff in said action then pending in the Superior Court of Marion County and the other defendants to said supplemental and ancillary bill of complaint were attorneys for said Allen G. Williams in said action.

(g) The pleadings hereinbefore identified are all of the pleadings which were filed in said equity cause 1191. Neither Indianapolis Gas, the Trustee, nor any predecessor trustee under said Mortgage, nor any bondholder of 1085 Indianapolis Gas was a party plaintiff, party defendant or intervenor in said equity cause No. 1191. The only persons or corporations who were parties to said cause are those hereinbefore referred to in this Stipulation.

(h) Said cause was tried to the court and evidence and arguments of counsel were heard. Thereafter, on May 29, 1930, the following decree was entered in said cause:

"It is Ordered, Adjudged and Decreed that the plaintiff's bill of complaint be and it is hereby dismissed for want of equity, to which ruling of the Court the plaintiff at the time excepts."

(i) Said Newton Todd took an appeal from said decree of the District Court to the Circuit Court of Appeals for the Seventh Circuit. Said decree of the District Court was affirmed by the Circuit Court of Appeals for the Seventh Circuit, its decision in said cause being reported in *Newton Todd v. Citizens Gas Company, et al.*, 46 F. (2d) 855.

(j) Said Newton Todd filed a petition in the United States Supreme Court for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review its affirmance of said decree of the District Court, which petition was denied by the United States Supreme Court on May 18, 1931, its decision being reported in *Newton Todd v. Citizens Gas Company, et al.*, 283 U. S. 852, 75 L. Ed. 1459.

(k) Said final decree of the United States District Court for the Southern District of Indiana, Indianapolis Division, in said cause No. 1191 has never been modified, reversed, vacated or set aside, but said decree is now in full force and effect.

14. (a) On the 12th day of March, 1930, Allen G.

Williams and Harold L. Bartholomew, as residents and taxpayers of the City of Indianapolis, suing on behalf of themselves and all other residents and taxpayers of said 1086 City similarly situated, commenced an action in the Superior Court of Marion County, Indiana. A correct copy of the complaint in said action, marked "Exhibit 35", is attached to this Stipulation. Subsequently said Harold L. Bartholomew withdrew as a plaintiff in said cause. Thereafter, on May 21, 1931, said Allen G. Williams filed a supplemental complaint in said cause, a copy of which, marked "Exhibit 36", is attached to this Stipulation. All of the defendants in said cause were served with process and appeared in said cause.

(b) On June 2, 1931, the following named defendants in said cause, Citizens Gas, Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welsh, Frederick G. Rastenburg, Paul E. Crosier; City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sukivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis, filed their separate motion to strike out portions of the complaint in said cause. A correct copy of said motion, marked "Exhibit 37", is attached to this Stipulation.

(c) On November 5, 1931, the Superior Court of Marion County, Indiana, sustained the specification of said motion (Exhibit 37) which sought to strike out the following portion of plaintiffs' complaint:

1087 "That thereupon it was designed by said confederates that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the Constitutional restrictions of the state and by those means destroy said Public Charitable Trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burden of replacing said Indian-

apolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said City of Indianapolis."

At the same time said court overruled all other specifications of said motion.

(d) After said motion to strike had been ruled upon by the court and on November 5, 1931, all the defendants in said cause, except Indianapolis Gas, Trust Company of America and Ferdinand Winter, as trustees under the Mortgage, and the individuals who were members of the Public Service Commission of Indiana, filed a demurrer together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 38," is attached to this Stipulation.

(e) After said motion to strike had been ruled upon by the court and on November 5, 1931, the defendants, Indianapolis Gas, and Ferdinand Winter and Trust Company of America, as trustees under the Mortgage, filed a demurrer, together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 39," is attached to this Stipulation.

(f) After said motion to strike had been ruled 1088 upon by the court and on November 5, 1931, the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Harry K. Cuthbertson and Jere West, as members of the Public Service Commission of Indiana, filed a demurrer to plaintiffs' complaint, together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 40," is attached to this Stipulation.

(g) The only persons or corporations who were parties to said cause are those named in the complaint therein (Exhibit 35). The pleadings hereinbefore identified are all of the pleadings in said cause.

(h) The Superior Court of Marion County, Indiana,

sustained each of said demurrers to the plaintiffs' complaint, and plaintiffs refused to plead further. On December 10, 1931, the following final judgment was entered in said cause:

"It is, therefore, considered, adjudged, decreed and ordered by the Court that the plaintiff take nothing by his complaint herein and that the defendants recover their costs herein laid out and expended, taxed at _____ dollars, to all of which the plaintiff at the time excepts."

(i) Thereafter said Allen G. Williams, as a plaintiff in said cause, took an appeal from said judgment to the Supreme Court of Indiana. On December 22, 1933, said judgment was affirmed by the Supreme Court of Indiana, its decision in that case being reported in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212. Thereafter said Allen G. Williams filed a petition for a rehearing of said cause in the Supreme Court of Indiana, which rehearing was denied by the Supreme Court of Indiana on the 17th day of April, 1934.

(j) Said final judgment of the Superior Court of Marion County, Indiana, has never been modified, 1089 reversed or set aside, but is now in full force and effect.

15. (a) In pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City of Indianapolis, a public offering for the sale of \$8,000,000 aggregate principal amount of City of Indianapolis Gas Plant Revenue $4\frac{1}{2}\%$ Bonds (hereinafter called "Revenue Bonds") was made on May 28, 1935. A correct copy of said resolution adopted May 7, 1935, marked "Exhibit 47," is attached to this Stipulation. A correct copy of the notice published by the City Controller of the City of Indianapolis pursuant to said resolution (Exhibit 47), marked "Exhibit A," is attached to the Answer and Counterclaim of defendants, the City of Indianapolis and its Trustees and Directors for Utilities, in each of these causes. Resolutions similar to that of May 7, 1935 (Exhibit 47), were adopted by the Board of Directors for Utilities of the City of Indianapolis on April 5, April 10 and April 12, 1935, and advertisements were published in pursuance of said resolutions on April 8, April 12 and April 18, 1935, respectively. Said resolutions were substantially identical with Exhibit 47. Said advertisements were substantially identical with Exhibit A to the Answer and Counterclaim of defendants, the City of Indianapolis and its Trustees and Directors for

Utilities in each of these causes. No bid resulting from said advertisements of April 8, April 12, and April 18th, 1935, was accepted by the City.

(b) The joint bid of Halsey, Stuart & Company, of Chicago, Illinois, and Otis & Company, of Cleveland, Ohio, for said Revenue Bonds was accepted by the Department of Utilities and the City on May 29, 1935. The proceeds of the sale of said Revenue Bonds were received June 27, 1935.

(c) The purchasers of said Revenue Bonds issued an advertising circular, a correct copy of which, marked "Exhibit B," is attached to the Answer and Counter-1090 claim of defendants, the City of Indianapolis and its Trustees and Directors for Utilities, in each of these causes.

16. (a) The City caused the sum of \$2,500,000 to be paid on or about July 1, 1935 for the retirement of all the Citizens Gas common stock, in full satisfaction of the common stockholders' interest in the property and assets of said company. Said \$2,500,000 included \$2,000,000 as the par value of said common stock and \$500,000 as dividends on said common stock at the rate of 10% per annum from January 1, 1933 to June 30, 1935. The City also caused the sum of \$1,050,000 to be paid on or about September 1, 1935, for the redemption of all the Citizens Gas preferred stock, in full satisfaction of the preferred stockholders' interest in the property and assets of said company. Said \$1,050,000 included \$1,000,000 as the par value of said preferred stock and \$50,000 as the premium of 5% on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

(b) On August 9, 1935, the Board of Directors for Utilities of the City of Indianapolis adopted a resolution with respect to the payment of the First and Refunding Mortgage Bonds of Citizens Gas Company of Indianapolis dated July 1, 1912, a copy of which resolution is attached hereto marked "Exhibit 48". In pursuance of said resolution (Exhibit 48) the City on August 10, 1935, published a notice, a copy of which, marked "Exhibit 49" is attached to this Stipulation, and in September, 1935 published a notice, a copy of which marked "Exhibit 50" is attached to this Stipulation. The principal amount of said bonds outstanding on August 12, 1935, was \$2,745,000. All of said bonds have been paid and surrendered

pursuant to said offer, except bonds aggregating the principal amount of \$32,000.

1091 17. (a) On September 9, 1935, Citizens Gas executed and transmitted to the City an Instrument of Transfer and Assignment of Personal Property, a correct copy of which is attached to the Bill of Complaint in each of these causes, marked "Exhibit E", in cause 1844 and "Exhibit F", in cause 1950.

(b) On September 9, 1935, Citizens Gas executed and transmitted to the City an Assignment of Lease assigning the aforesaid Lease, a correct copy of which Assignment of Lease is attached to the Bill of Complaint in each of these causes, marked "Exhibit F" in cause 1844 and "Exhibit G" in cause 1950.

(c) On September 9, 1935, Citizens Gas executed and transmitted to the City a Deed of Conveyance of Real Estate, a correct copy of which, marked "Exhibit 55", is attached to this Stipulation.

(d) On September 9, 1935, Citizens Gas executed and transmitted to the City a certain Assignment of Lease assigning a lease to part of the Majestic Building in the City of Indianapolis, a correct copy of which Assignment of Lease, marked "Exhibit 56", is attached to this Stipulation.

(e) The descriptions contained in the above instruments of transfer described in this subdivision 17 of this Stipulation embraced all of the property of every kind or description owned by Citizens Gas immediately prior to the delivery of said instruments on September 9, 1935.

(f) Prior to the execution and transmittal of said instruments of transfer and conveyance described in this subdivision 17 of this Stipulation, neither the City nor its Department of Utilities gave any notice to the Trustee or any formal notice to any holder of Bonds of Indianapolis Gas that said transfer and conveyance was to be made.

1092 18. Attached to this Stipulation are true and correct copies of certain correspondence (which correspondence was in each instance received by the addressee on or soon after the date thereof), as follows:

(I) Letter dated July 23, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 58" to this Stipulation.

(II) Letter from counsel for the Department of Utilities to Arthur V. Brown and Louis B. Ewbank dated August 31, 1935, identified as "Exhibit 59" to this Stipulation. At the date of said letter said Arthur V. Brown

was the Vice President and Treasurer and said Louis B. Ewbank was the attorney for Indianapolis Gas.

(III) Letter dated September 9, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 60" to this Stipulation.

(IV) Letter dated September 24, 1935, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 61" to this Stipulation.

(V) Another letter dated September 24, 1935, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 62" to this Stipulation.

(VI) Letter dated September 27, 1935, from the Department of Utilities to Indianapolis Gas identified as "Exhibit 63" to this Stipulation.

(VII) Letter dated September 30, 1935, from the Department of Utilities to Indianapolis Gas, identified 1093 as "Exhibit 64" to this Stipulation.

(VIII) Letter dated September 30, 1935, from Indianapolis Gas to Department of Utilities, identified as "Exhibit 65" to this Stipulation.

(IX) Letter dated September 30, 1935, from Indianapolis Gas to Thompson, Rabb & Stevenson, identified as "Exhibit 66" to this Stipulation. Thompson, Rabb & Stevenson were, during the entire year 1935, attorneys for the Department of Utilities of the City of Indianapolis.

(X) Another letter dated September 30, 1935, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 67" to this Stipulation.

(XI) Letter dated October 10, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 68" to this Stipulation.

(XII) Letter dated January 6, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 69" to this Stipulation. A correct copy of the resolution of the Board of Directors for Utilities of the City of Indianapolis, adopted by said Board on January 3, 1936, referred to in the above letter, is marked "Exhibit 76" and attached to this Stipulation.

(XIII) Letter dated February 8, 1936, from Indianapolis Gas to the Department of Illinois, identified as "Exhibit 75" to this Stipulation.

(XIV) Written proposal dated February 10, 1936, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 76" to this Stipulation.

(XV) Letter dated February 10, 1936, from W. H. Thompson, one of the attorneys for the Department of

Utilities, to Louis B. Ewbank, attorney for Indianapolis Gas, identified as "Exhibit 77" to this Stipulation.

(XVI) Letter dated March 20, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 78" to this Stipulation.

(XVII) Letter dated April 6, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 79" to this Stipulation.

(XVIII) Letter dated April 8, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 80" to this Stipulation.

(XIX) Letter dated May 12, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 81" to this Stipulation.

(XX) Letter dated May 23, 1936, from Thompson, Rabb & Stevenson, attorneys for the Department of 1095 Utilities, to Indianapolis Gas, identified as "Exhibit 82" to this Stipulation.

(XXI) Letter dated May 25, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 83" to this Stipulation.

(XXII) Letter dated June 3, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 84" to this Stipulation.

(XXIII) Letter dated September 30, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 85" to this Stipulation.

19. (a) On March 2, 1936, the City and Indianapolis Gas entered into a written agreement, a correct copy of which is attached to the Bill of Complaint in each of these causes, marked "Exhibit H" in cause 1844 and "Exhibit I" in cause 1950. Said agreement has never been modified or supplemented in any respect.

(b) No settlement agreement as provided in said agreement of March 2, 1936 has ever been agreed upon between the City and Indianapolis Gas. Since said agreement was signed neither of said defendants has taken any steps to obtain a judicial determination of the validity of the Lease, except that (1) on October 1, 1936, the City filed a counterclaim in cause 1844; (2) on October 28, 1938, the City filed a counterclaim in cause 1950; and (3) on December 24, 1937, the City commenced an action to 1096 obtain a judicial determination of the validity of

the Lease, which action is now pending as cause No. 13873 in the Circuit Court of Boone County, Indiana.

(c) Indianapolis Gas did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938, and October 1, 1938, on any of the Bonds, and all of said interest coupons remain unpaid.

20. (a) The City, pursuant to the terms of the Agreement of March 2, 1936, (Exhibit H in cause 1844 and Exhibit I in 1950), has to December 31, 1938, deposited with defendant, The Indiana National Bank of Indianapolis, as escrow agent, the sum of \$1,217,875, which is now held by said bank. Said bank has never at any time paid out any of the sums so deposited with it. All the sums so deposited with said bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the Lease.

21. (a) On September 9, 1935, the Board of Directors of Citizens Gas adopted a resolution, a correct copy of which, marked "Exhibit 86" is attached to this Stipulation. On the same day the Board of Trustees of Citizens Gas, meeting separately, adopted a resolution, a correct copy of which, marked "Exhibit 87", is attached to this Stipulation.

(b) Pursuant to the requirement contained in each of said resolutions (Exhibits 86 and 87), the City, acting by its Board of Directors for Utilities, on September 9, 1935, executed and delivered to Citizens Gas an Indemnity Agreement, a correct copy of which, marked "Exhibit 1097 J", is attached to the Second Amendment and Supplement to Plaintiff's Bill of Complaint in cause 1844 and to the Amendment and Supplement to Plaintiffs' Bill of Complaint in cause 1950.

22. (a) Prior to the commencement of these actions, neither the Trustee nor any of the bondholders who are plaintiffs in cause 1950 made any request of or demand upon Indianapolis Gas that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity of said Lease.

23. The City of Indianapolis has been a first-class city within the meaning of the Indiana statutes continuously since January 1, 1910. No other city of Indiana has been a first-class city during any of said period. The City of Indianapolis has had a population exceeding 300,000 continuously since January 1, 1920, as shown by the United States census made in 1920 and 1930, and no other city

of Indiana has had a population of 300,000 during any of said period.

24. It is the contention of the City and the individual members of the Board of Trustees and Board of Directors for Utilities that certain actions taken by the City were taken in its capacity as trustee of a public charitable trust and not in its capacity as a municipal corporation. Nothing in this Stipulation shall constitute an agreement as to the capacity in which the City acted in any particular instance.

25. In the preparation of this Stipulation Exhibit numbers ranging from 1 to 87 have been employed, but no exhibits are identified in this Stipulation bearing any of the following numbers: 1 to 4 inclusive, 10, 11, 12, 15 to 19 inclusive, 21, 25 to 29 inclusive, 33, 34, 41 to 46 inclusive, 51 to 54 inclusive, 57, 71 to 74 inclusive.

February 15th, 1939.

Wm. L. Taylor,

Howard F. Burns,

*Solicitors for Plaintiffs (in cause 1844),
The Chase National Bank of the City
of New York, Trustee.*

1098

Howard F. Burns,

Harvey J. Elam,

Solicitors for Plaintiffs in Cause 1950.

Edward H. Knight, by W. H. T.,

Corporation Counsel of Indianapolis.

Michael B. Redding, by W. H. T.,

City Attorney of Indianapolis.

William H. Thompson,

Albert L. Rabb,

*Solicitors for the City of Indianapolis
and the individual defendants who
are members of the Board of Trustees
or of the Board of Directors for
Utilities of the City of Indianapolis.*

Wm. R. Higgins,

Louis B. Ewbank,

Solicitors for defendant, The Indianapolis Gas Company.

Paul Y. Davis,

William G. Sparks,

Solicitors for defendant, Citizens Gas Company of Indianapolis.

Louis B. Ewbank,

*Solicitor for defendant (in cause 1950),
The Indiana National Bank of Indianapolis.*

1099 PLAINTIFFS' STIPULATION EXHIBIT 5.

Minutes of Meeting of Board of Directors of Citizens Gas Company, February 26, ~~1915~~. 1913

"An Adjourned Meeting of the Board of Directors of the Citizens Gas Company of Indianapolis Was Held at the University Club at 12:15 P. M. February 26, 1913.

"The following members were present within ten minutes of the beginning of the meeting:

"Messrs. Bachman, Forrest, Hooker, Lieber, Schmidt, Vonnegut, Welch. Messrs. Potts and Mooney were absent.

"On motion of Mr. Lieber, seconded by Mr. Hooker, it was ordered that First and Refunding Mortgage bonds be sold to a syndicate headed by Gavin L. Payne & Company, at a price of 95 and interest, on the following dates and in the following quantities:

| | |
|-------------------|-----------|
| May 1 | \$ 50,000 |
| June 1 | 50,000 |
| July 1 | 100,000 |
| August 1 | 100,000 |
| September 1 | 50,000 |
| October 1 | 100,000. |

"Mr. H. H. Hornbrock of counsel was invited into the meeting and read a certain proposed contract with Volney T. Malott and Associates, providing as follows:

"This Agreement made and entered into this 27th day of February 1913, by and between Volney T. Malott for himself and Associates, party of the first part, and The Citizens Gas Company of Indianapolis, Indiana, party of the second part, Witnesseth:

"Whereas, the party of the first part, on behalf of himself and associates, has been in negotiations for more than one-half of the capital stock of the Indianapolis Gas Company and expects to acquire sufficient of such stock to insure, so far as the acts of the Indianapolis Gas Company and of its stockholders are concerned, the power to execute a valid lease of that company's operating plant and system in the City of Indianapolis, and whereas the consummation of such purchase will be materially affected in its details if said Malott and associates shall before completing it know to a certainty that a lease, such as hereinafter mentioned, will be made by said Indianapolis

Gas Company to said Citizens Gas Company, subject only to the approval of the Public Utilities Commission of the State of Indiana.

1100 " 'And Whereas, the Citizens Gas Company is desirous, upon proper terms and conditions, of securing a lease of such part of the plant and system of the Indianapolis Gas Company as may be used by it and useful to it in manufacturing and distributing gas.

" 'Now Therefore It Is Agreed: That in the event the party of the first part and his associates shall complete the purchase of sufficient of the stock of said Indianapolis Gas Company of the State of Indiana, to execute a valid lease to the second party hereto of the plant and system of said Indianapolis Gas Company, in the form of the contract of lease hereto attached and marked 'Exhibit A', that the second party hereto will promptly upon the completion of the purchase of such stock by the first party enter into the contract of lease, a copy of which is attached hereto, and upon the same being duly executed by said Indianapolis Gas Company, the same shall be a binding and effective contract of lease between said companies, subject only to the approval of the Public Utilities Commission of the State of Indiana. And the first party agrees that upon securing control of such stock, it will cause said lease to be executed by said Indianapolis Gas Company, so far as it legally may do so, provided if said lease is not fully closed by October 1, 1913, then neither party shall be further bound by any obligation hereof.

" 'The parties mutually agree that they will use all reasonable effort in securing the approval of said lease by said Public Utilities Commission, such lease being, as it appears to them, in all respects a fair lease and contract.

" 'In event any extensions or betterments are made after this date by the Indianapolis Gas Company to its plant and system (other than those embraced in the contract of the Semet Solvay Company) for which said Gas Company is entitled to draw down bonds under its existing mortgage, it shall be permitted to do so, and in addition thereto it shall be permitted as between it and the second party to draw down bonds on account of the work being done under the Semet Solvay Company contract in such amount as when added to the bonds drawn down on account of extensions and betterments not covered by said contract, will produce if sold at 85 per cent of par the

total cost of such additional extensions or betterments, other than those covered by the Semet Solvay Company hereafter made; and the bonds thus drawn down shall remain the property of said Gas Company to use as it sees fit and such amount of bonds shall be added to the total of \$4,833,000 now outstanding as the total outstanding bonds on which the said Citizens Gas Company shall pay interest as a part of its rental under said lease. Except as herein provided escrow bonds shall not be drawn down on account of the Semet Solvay contract or on account of any betterments heretofore made.

1101 "After control of said stock is acquired by the first party the merchandise and supply account of the Indianapolis Gas Company shall be kept up to substantially the same value as to the several items thereof as existed on February 1, 1913, to the end that when said lease goes into effect there shall be on hand usual and customary quantities of such supplies and merchandise as said Indianapolis Gas Company would probably have on hand were no lease in contemplation. Any variation from the total value of the supplies and merchandise on hand February 1st, 1913, shall be adjusted by a cash payment one way or the other as the case may be, provided Lessee shall not be required to take over supplies and merchandise in excess of \$75,000.

"The parties hereto shall mutually cooperate to limit the total cost of the work done under the Semet Solvay Company contract to a total of not to exceed \$600,000."

"Mr. H. H. Hornbrook of counsel then read the proposed contract of lease provided for in the foregoing, as follows:

• • • • •
 "(Here is inserted the proposed 'Agreement of Lease'. Said Agreement of Lease is substantially identical with the Lease finally executed between the parties, a copy of which is attached to the bill of complaint as Exhibit B thereto I R. 51-80), with the following exceptions:

"(a) The proposed 'Agreement of Lease' did not contain:

"(I) The metes and bounds description of the Indianapolis Gas property as it appears in the 4th to 9th grammatical paragraphs, inclusive, of the executed Lease (I R. 52-4).

"(II) The 13th grammatical paragraph of the executed Lease (I R. 55).

"(III) The 3rd grammatical paragraph of Subdivision 6 of the executed Lease (I R. 58).

"(IV) The last grammatical paragraph of Subdivision 7 of the executed Lease (I R. 60).

"(V) The next to the last grammatical paragraph of Subdivision 15 of the executed Lease (I R. 66).

"(VI) All of Subdivision 16 of the executed Lease, except the first sentence thereof (I R. 66-7).

"(VII) Subdivisions 26, 27 and 27½ (containing 19 grammatical paragraphs) of the executed Lease (I R. 73-77).

"(VIII) Subdivision 31 of the executed Lease (I R. 79).

"(b) In place of the 3rd, 4th, and 5th grammatical paragraphs of Subdivision 21 of the Lease as executed (I R. 70, lines 8-43), the proposed Agreement of Lease contained the following provisions:

"'2. The Lessee will pay to the Lessor as additional rental for the demised property:

"'On the 31st day of December, 1913, the sum of thousand Dollars, being at the rate of One Hundred and Twenty Thousand Dollars per year for the period from the beginning of this lease to the 1st day of January 1914.

"'On the 30th day of June and the 31st day of December, 1914, and thereafter semi-annually on the last days of June and December of each year, the sum of Seventy Thousand Dollars, provided however when the dividends paid on the capital stock of the Lessee Company shall in any calendar year equal eight per cent of the par value thereof, thereupon in the calendar year following the semi-annual rental to be paid the Lessor shall be Eighty Thousand Dollars and being thus once fixed shall, except as hereafter provided, remain at such sum during the remainder of the term created by this lease; provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of \$160,000 a year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid), then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and forty thousand dollars (\$140,000), payable in

two equal semi-annual payments, as hereinbefore provided. For any fractional six months period immediately preceding the termination of the lease, the rental shall be at the same rate as that paid for the preceding six months period.'

"(c) In place of Subdivision 22 of the Lease as executed (I R. 72), the proposed Agreement of Lease contained Subdivisions 22 and 23, reading as follows:

"22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its mortgage to the Trust Company of America, dated October 1st, 1902, securing an issue of bonds in the sum of Seven Million Five Hundred Thousand Dollars (\$7,500,000) hereinabove referred to; and also all covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds contained in any refunding or renewal mortgage executed pursuant to the provisions of Article 7 of this lease.

"As between the parties hereto it is agreed that the Lessee may at any time invest its funds in the outstanding bonds of the Lessor, but its acquirement thereof shall not be deemed a cancellation or retirement thereof unless the Lessee expressly elects to have the same cancelled or retired.

"23. The Lessee covenants that it will upon the original or other maturity of any of the obligations secured by the aforesaid mortgage of the Lessor, or by any mortgage or mortgages taking its place, refinance such debts with new bonds secured by mortgage on the leased property, or with other obligations of the Lessor, in such manner and form as the Lessee shall deem advisable and the Lessor in writing approves, and the Lessor covenants to do such acts as may be reasonably required of it to carry out such refinancing.'").

1118 "Mr. Lorenz Schmidt offered the following resolution and moved its adoption.

"Whereas Volney T. Malott for himself and associates at the suggestion of persons connected with the management of this Company has been in negotiations for the purchase of a control of the Indianapolis Gas Company with the sole object of bringing the plants and gas system of said Company under the control of the Citizens Gas Company, and such negotiations have now reached a point where the said Volney T. Malott must close or abandon

the same, and he is unwilling to close the same except upon proper assurances that if he acquires such control a proper lease will be entered into by the Citizens Gas Company, for the taking over of such property.

"Now therefore be it resolved by the Board of Directors of the Citizens Gas Company of Indianapolis 1119 that the President and Secretary of the Company be and they are hereby authorized to execute on behalf of the Company the contract with V. T. Malott this day read at the meeting of the Board, and in event said V. T. Malott and his associates shall acquire control of the Indianapolis Gas Company so as to authorize the execution of the form of lease accompanying said contract, that then the President and Secretary of this Company be and they are hereby authorized to enter into said contract of lease on behalf of this Company, and in connection therewith to consent to any changes in form in said lease which in their judgment do not vary the material rights acquired and obligations incurred by this Company.

"A copy of said contract and lease shall be set out in the minutes of this meeting."

"Which motion was seconded by Mr. Bachman.

"After full discussion by all the Directors present, which was participated in by the Trustees present, the motion was amended with the consent of Mr. Schmidt and Mr. Bachman by adding to said resolution the following provision:

"Provided however that to the rental clause in the lease as read to the meeting the following be added—
"provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of \$160,000 a year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid) then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and Forty Thousand Dollars, payable in two equal semi-annual payments as hereinabove provided.""

"The resolution as thus amended was put to a vote and all the Directors present voted aye, except Mr. Lieber, who voted no.

"On motion, duly seconded, the Board adjourned, all

members who were present at the beginning of the meeting being present at the adjournment of same."

(Sgd.) Franklin Vonnegut,
President."

J. D. Forrest,
Secretary.

(Pages 1-15, inclusive, of Minute Book)

1120 PLAINTIFFS' STIPULATION EXHIBIT 6.

Minutes of Meeting of Board of Trustees of Citizens Gas Company, February 26, 1913.

"A Special Meeting, Duly Called, of the Board of Trustees of the Citizens Gas Company of Indianapolis Was Held at the University Club at 12:30 O'clock P. M. February 26, 1913.

"Present: Messrs. Sullivan and Swift, Mr. Schnull consenting to be counted presented over the telephone while the meeting was in session, and voting aye on the adoption of the following resolution:

"Resolved by the Trustees of Citizens Gas Company that full consent, ratification and approval is hereby given to the action of the Board of Directors of this Company taken at their meeting this day with reference to the execution of a contract with V. T. Malott touching a proposed lease by this Company of certain property of the Indianapolis Gas Company, and that the Trustees will hereafter take such further formal action as may be hereafter found necessary to authorize the execution of said lease, if the conditions shall arise which enable such lease to be executed by the Indianapolis Gas Company."

"Messrs. Sullivan and Swift also voted aye.

"Whereupon the meeting adjourned.

"J. D. Forrest (Sgd.)
Secretary.

Thomas L. Sullivan (Sgd.)
President."

"Note on Above Special Meeting of the Board of Trustees of the Citizens Gas Company of Indianapolis.

"At 11 A. M. March 4, 1913, H. H. Hornbrook of counsel of Company, and J. D. Forrest, Secretary, called on Henry Kahn, Trustee, at Mr. Kahn's office in the City of New York, and explained to him the action of the Direc-

tors and Trustees of the Company as set forth in the records of the respective meetings of Feb. 26, 1913. Mr. Kahn expressed his full approval of all actions so taken."

(Page 15 of Minute Book)

1121 PLAINTIFFS' STIPULATION EXHIBIT 7.

Minutes of Meeting of Board of Trustees of Citizens Gas Company, September 30, 1913.

"On Adjournment of the Board of Directors of the Citizens Gas Company of Indianapolis as Above Recorded, Messrs. Sullivan, Spann, Swift and Kahn of the Board of Trustees Met and Waived Notice of Special Meeting for the Consideration of Matters Pertaining to the Proposed Lease by the Citizens Gas Company of the Plant and Property of the Indianapolis Gas Company, Whereupon the Trustees Adjourned to Meet at the Office of Messrs. Smith, Hornbrook & Smith at 2 O'clock P. M. September 30, 1913.

"J. D. Forrest (Sgd.)
Secretary.

Thomas L. Sullivan (Sgd.)
President."

"The Board of Trustees of the Citizens Gas Company of Indianapolis Met in An Adjourned Session Conjointly With the Meeting of the Board of Directors, at the Office of Messrs. Smith, Hornbrook & Smith at 2 O'clock P. M., September 30, 1913.

"Present: Messrs. Sullivan, Spann, Swift, Kahn.

"The Secretary laid before the Board of Trustees a communication from Mr. G. A. Schnull of said Board waiving notice of any meetings to be held during his absence from the city, said waiver being as follows:

"'As I expect to leave on Wednesday, June 11th, for an extended trip to Europe, I hereby wish to waive notice of any meeting of the Trustees of the Citizens Gas Co., which may be held during my absence from the City. My address will be C/o American Express Company, 11 Rue Scribe, Paris, France. All letters and cablegrams will be forwarded to me by this Company.'"

1122 "On motion of Mr. Spann, seconded by Mr. Kahn, all prior action of the Board of Trustees of the Citizens Gas Company of Indianapolis relating to the

proposed lease of the property of The Indianapolis Gas Company was rescinded.

"After discussion as to the proposed lease of the property of The Indianapolis Gas Company, and a consideration of the modifications therein required by the Public Service Commission of Indiana, Mr. Kahn offered the following resolution and moved its adoption.

"Resolved, That the Trustees of Citizens Gas Company of Indianapolis upon consideration of the proposed lease of the plant and property of the Indianapolis Gas Company by the Citizens Gas Company of Indianapolis, embodying the modifications therein required by the Public Service Commission of the State of Indiana, do hereby consent to and approve the execution thereof, and do vote all the stock of said company in favor of the approval of such lease."

"Which motion was seconded by Mr. Swift, and being put upon its passage, was unanimously adopted.

"On motion duly seconded the Board adjourned.

"J. D. Forrest (Sgd.) Thomas L. Sullivan (Sgd.)
Secretary. *President.*"

(Pages 48 and 69 of the Minute Book)

• • • • •

1128 PLAINTIFFS' STIPULATION EXHIBIT 13.

Fishback *vs.* Public Service Commission of Indiana,
et al.

First Paragraph of Complaint.

Omitting the parts stricken out on motion of some of the defendants, the caption, the signatures and the verification, the first paragraph of complaint in Fishback *vs.* Public Service Commission of Indiana, *et al.* (cause No. 23,231 in the Circuit Court of Marion County, Indiana; No. 101,192 in the Superior Court of Marion County, Indiana; and No. 23,943 in the Supreme Court of Indiana) was as follows:

"The plaintiff, Frank S. Fishback, by way of complaint against the defendants, Public Service Commission of Indiana, Citizens Gas Company of Indianapolis, and Indianapolis Gas Company, alleges the following facts:

"The plaintiff is now and for many years last past has been a resident freeholder and taxpayer in the city

of Indianapolis; that he was one of the incorporators of the defendant, Citizens' Gas Company, and is now and since its organization has been the owner of eight shares of its capital stock. He holds a certificate of such stock duly issued by the company, which reads as follows:

"Trustee's Certificate

Citizens Gas Company of Indianapolis

Number 3006

Shares—8

This certifies that Frank S. Fishback is entitled to eight shares of the par value of \$25.00 each, of the capital stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding stock of said company, have, with the consent and agreement of the aforesaid owner been issued to a board of five trustees as provided in the articles of incorporation of said company and in the gas franchise granted to it by city of Indianapolis, August 25, 1905; and said capital stock shall be and remain under the exclusive and irrevocable control of said board of five trustees and their successors, with full, complete, exclusive and irrevocable power in said board of trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the articles of incorporation of said company mentioned, set forth and described. The aforesaid holder of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the directors thereof; and when said certificate holder shall have received, by dividend or otherwise, upon said certificate an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then this 1129 certificate shall be deemed fully paid and canceled and the interest of said holder in said company and its assets shall thereupon cease, and the property of said company shall be disposed of as provided in said articles of incorporation. This certificate is transferable only on the books of the company by holder thereof in person or by attorney, on surrender of this certificate properly endorsed.

In Witness Whereof, This certificate is signed by the president of the board of trustees, attested by the presi-

dent and secretary of the board of directors, and sealed with the seal of said company, this 11th day of August, A. D. 1908.

Thomas L. Sullivan,
President Board of Trustees.

Attest:

Franklin Vonnegut,
President Board of Directors.

J. D. Forrest,
Secretary Board of Directors."

"The plaintiff brings this action as such stock and certificate holder, and as such resident of the city of Indianapolis. for the protection of his rights as such stock and certificate holder and such resident, and for the protection of all others similarly interested.

"The defendant, Citizens Gas Company of Indianapolis, is a corporation organized under the laws of the state of Indiana, the articles under which it was incorporated having been filed in the office of the secretary of state of the state of Indiana on the 23d day of May, 1906, and which read as follows:"

(The Articles of Incorporation of Citizens Gas Company of Indianapolis were copied here. A copy of said Articles of Incorporation is attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as part of Exhibit D.)

"On the 30th day of August, 1905, the City of Indianapolis entered into a franchise contract with Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, by the terms of which the grantees were given the right to enter upon, and lay, construct, maintain and operate a system of pipes in and along the streets, alleys, and other places in the city of Indianapolis for the distribution and sale of gas. By the terms of such contract, the grantees were given permission to, and thereafter on the _____ day of _____, 1906, they did, assign such contract to the defendant, Citizens Gas Company, and that company entered into and became possessed of all the rights of the original grantees of such contract. It took over, constructed and laid a system of mains, pipes, machinery, and tools, and from that date until the present time the defendant has been operating such a system under the contract originally granted to Potts, Stalnaker and Schmidt, which contract reads as follows:"

(The Franchise Contract by and between the City of Indianapolis and Alfred F. Potts, and others, and the amendments thereto were copied here. A copy of said Franchise Contract and the amendments thereto is attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as part of Exhibit C.)

1130 "The defendant, the Indianapolis Gas Company, is a corporation existing under the laws of the State of Indiana, now and for many years heretofore owning and operating a plant in the city of Indianapolis through which it supplied artificial gas to the residents of Indianapolis. At the time of the filing of the petition for leave to lease the plant of this company by the Citizens Gas Company, such plant included about 375 miles of mains and pipes of various sizes laid in the streets and alleys of the city, together with certain coal gas and water gas plants, used in the manufacture of the artificial gas sold by the Indianapolis Gas Company. A large part of the mains are old, much having been in the ground for twenty years and more, and large portions of them are in bad repair, rotten, weakened by having been buried in the ground for such a length of time and by electrolysis. The coal and water gas plants are obsolete and incapable of providing gas at a cost that would enable the producer to sell it at a profit in competition with a plant manufacturing and selling gas produced by modern methods, and within the price fixed by the laws of the State of Indiana. The condition of the system of the Indianapolis Gas Company, and the obsolete character of its plants and machinery are and have been such that it has not been able to do a profitable business for many years, has not been able to pay any dividends to its stockholders for twenty years, and has been compelled to borrow money to pay the interest on its bonds and other fixed liabilities. Prior to and at the time of the filing of the petition by the defendants as hereinafter referred to, the Indianapolis Gas Company was practically insolvent. The capital stock of such company is \$2,000,000, and its bonded indebtedness \$4,833,000, which capitalization is much beyond the actual value of the combined property of said company.

"On the 21st day of May, 1913, the defendant, Citizens Gas Company, filed with the defendant Public Service Commission, a petition asking for permission

to take over and lease the property of the Indianapolis Gas Company for a term of 99 years, which petition reads thus:

“Indianapolis, Ind., May 21, 1913.

To the Public Service Commission of the State of Indiana:

Gentlemen:

The undersigned, Citizens Gas Company of Indianapolis, and The Indianapolis Gas Company, respectfully show:

1. That each of the undersigned companies is a corporation duly organized under the laws of the State of Indiana, authorizing the formation of mining and manufacturing companies, and is now actively engaged in the manufacture and sale of gas for heating and lighting purposes in the City of Indianapolis.

2. That said companies are both furnishing gas to consumers in the City of Indianapolis at a maximum rate of sixty cents per thousand feet; and at lower rates upon a sliding scale to large consumers; that the rates for gas in the City of Indianapolis are at least fifteen per cent lower than now exist in any other city in the United States and are at least twenty-five per cent below the average rates of cities of equal or larger size.

3. That said companies have at all times since the completion of the plant of the Citizens Gas Company been active and aggressive competitors, the result 1131 of which has been, not only a duplication of pipe lines in many parts of the city, which would have never occurred had there been a unification of service, but also a wastage in current expense as the direct result of dual operation amounting to a great many thousand dollars annually.

4. That the interests of the public generally and of the stockholders of the undersigned companies require that said plants shall be put under a single management, the wastage of further duplicate service and dual operation terminated, if the same can be done on proper terms and conditions.

5. That as will be seen from the accompanying copy of its charter, by-laws and franchise from the City of Indianapolis under which it operates, the Citizens Gas Company of Indianapolis is largely a co-operative institution

organized for the purpose of affording to the public the benefits of cheap gas with limited dividends to the stockholders, and providing for an ultimate transfer of the property on certain conditions to the City of Indianapolis for the benefit of the entire public; and it is believed that the lease now proposed will promote the realization of the purposes of the organization of said company.

6. That one of the occasions of the passage of the law creating this commission was the growing feeling throughout the country that there should be vested in some public agency the authority to regulate the affairs of public utilities and as an important phase of such regulation to save to the public the expense of maintaining duplicated service when the same can properly be done.

The foregoing facts being considered, the undersigned have prepared a tentative form of lease, under the terms of which the undersigned, The Indianapolis Gas Company, leases unto the undersigned Citizens Gas Company of Indianapolis all its operating plant and system in the City of Indianapolis, which it submits to this commission for its consideration.

And they now respectfully request the commission to make due inquiry in the premises and if thereupon they shall deem the same proper and for the interests of the public, as well as the stockholders of the undersigned companies, that they shall adopt and approve the terms and conditions in said form of lease set forth and thereupon authorize the undersigned companies to enter into and execute the same in such manner and upon such conditions as may be by law required or by the commission prescribed.

Respectfully submitted,

Citizens Gas Company of Indianapolis,

By _____

The Indianapolis Gas Company,

By _____

”

“The plaintiff, Fishback, desiring to oppose the execution of such a lease as was described in the petition, filed with the defendant, the Public Service Commission, an intervening petition by way of remonstrance, which reads as follows:

"STATE OF INDIANA,**BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.**

**In the Matter of a Petition of the Citizens Gas Company
for Permission to Lease Property of the Indianapolis
Gas Company.**

Objections of Frank S. Fishback.

Comes now Frank S. Fishback and respectfully shows that he was one of the incorporators of the Citizens Gas Company, and is now a stockholder therein, and that he is a resident free holder of the city of Indianapolis; 1132 that as such stockholder and as such resident of said city he objects to the granting of the petition filed in this matter by the Citizens Gas Company on the following ground:

First. The physical valuation and the earning capacity of the Indianapolis Gas Company are not such as to warrant the payment to it of the rental proposed to be charged the Citizens Company.

What evidence is there before the commission of the real value of the Indianapolis Company's property? Mr. Forrest guessed it at five million dollars and that is the best evidence offered. Mr. Malott stated he thought the Gas building was worth \$350,000, but I have no recollection that he placed a valuation on the plant. Upon such evidence the commission is asked to hold that \$..... is a fair annual rental for the property proposed to be leased.

It was made plain that no dividends had been earned by the Indianapolis Company for twenty years. The plan suggested now is that the Citizens Company shall take over the system, guarantee seven per cent dividends on the two million dollars of stock and interest on the several million dollars of bonds and at the same time pay ten per cent interest to its own stockholders and the interest on its own issue of bonds. That is a stupendous task Mr. Forrest seems willing to undertake, but I doubt if the commission is convinced that the interests of the stockholders of the Citizens' Company will be as well protected as those of Mr. Malott and his associate philanthropists.

On the question of valuation I submit as a part of this protest a copy of a statement in writing made and filed by L. C. Boyd, vice-president of the Indianapolis Gas Company, on May 12, 1913, with the assessor of Marion county. Mr. Boyd is Mr. Malott's associate in the syndicate, and

probably has had more to do with the transaction than anyone else. His estimate of the value of the assets of the company is official, made after due consideration, and should carry much weight with the commission.

Mr. Boyd places a total valuation on all of the property of the company, real and personal, of \$1,223,250. Deducting from this \$350,000, the valuation of the office building as fixed by Mr. Malott, leaves a balance of \$873,250. That, according to the vice-president of the company, is the actual value of the property now proposed to be leased to the City of Indianapolis for a period of seventy-four years from 1931 for an annual rental of over \$370,000.

Mr. Forrest stated that Citizens Gas stock was now worth one hundred sixty-five on the market. That, he stated, was because of the guaranteed dividends and the record of the company. In answer to Mr. Murphy's question he stated his belief that Indianapolis Gas stock would advance if the lease were made but would not reach one hundred and sixty-five.

The dividend guaranteed under the lease is seven per cent or more. I figure that the stock will be worth at least 145-1/2, basing the estimate on Mr. Forrest's statement. If Mr. Malott and his friends paid ninety, being the experienced financiers that they are, they could easily and evidently did assume that the profit to them would be large, certain and quick.

I submit that a stock paying a guaranteed dividend of 7 or 8 per cent for ninety-nine years bought at 90 is a better investment than a stock paying 10 per cent bought at 1133 165 guaranteed for 18 years. If Mr. Malott et al. are sincere in their protestations of friendliness to the Citizens Company, why have they not offered to base the 7 per cent rental on what the stock cost them.

Second. The Indianapolis Gas Company is without power to enter into the lease proposed for the following reasons:

A. The statutes under which it and its predecessors were organized give it no power.

B. It has no charter or franchise from the city to use the streets. It is there at the sufferance of the city. Under no contract that it could make with the Citizens Company would the latter acquire any right to use the streets in the operation of the system of the Indianapolis Company. If the latter has no right in the streets the permission of this commission to make the lease as petitioned would not create any rights. (Section 95, Acts 1913, page 198.)

Before it be permitted to make the lease proposed in any event I suggest to the commission that the Indianapolis Company must do one of two things, i. e., either show it has a right to the use of the streets occupied by its mains, under a charter; or admit it has no charter and ask for an indeterminate permit under conditions to be fixed by the commission.

In this connection it is pointed out that this is not an application by the Citizens Company for permission to purchase the plant of the other company, make it a part of its own plant and operate under the Citizens Company charter. The two systems are to be kept separate.

Third. Under section 95-1/2 of the Public Utilities Act (Acts 1913, page 169), no public utility may lease the plant of any other like public utility without the consent of the holders of three-fourths of the capital stock outstanding of the proposed lessee.

It may be assumed that the petitioner offers as a reason for the non-application of the above act to the case in hand, the provision in the charter of the Citizens Company that the board of trustees of the company shall have full, complete, exclusive and irrevocable power to hold its stock and vote the same as fully and completely as if they were the owners of the capital stock, and that the trustees have voted in favor of the leasehold arrangement.

A voting trusteeship of the kind created would not deprive the owners of the stock of the right created by section 95-1/2. It is not a question of how the stock shall be voted by the trustees. The trustees may vote as a unit in favor of the proposition but that will not take the place of the required consent of the stockholders. That consent has not been asked or given and in its absence I submit the application should be denied.

Fourth. The Citizens Company has no power to make a lease covering a period longer than the term of its existence. If not before, by dividends and interests, then at the end of 25 years the certificates of stock are to be canceled and the corporation wound up.

A fair interpretation of the charter means that the city now owns the Citizens Company's plant and business, and that the company is to have the use of them until it has paid the shareholders the money they advanced to pay 1134 for its building, with 10 per cent interest on that money. If the money with the interest is repaid at any time within 25 years, the company must surrender the plant to the city; if not paid before, then at the end of 25

years the plant must be surrendered to the city subject to the lien of the mortgage that may be given to pay the shareholders the balance due on their original loan with the 10 per cent.

I contend that the Citizens Gas Company is without power to make lease binding on the city of Indianapolis for a period of 74 years after the company goes out of existence.

I attach to this protest clippings from the Daily Reporter, a commercial paper published in Indianapolis, showing quotations on the Indianapolis exchange on Indianapolis Gas stock. These show that in 1911 the stock was down to fifteen cents and that after public intimation was made of the proposed lease the stock has risen to almost par. It seems to me this justifies the foresight of Mr. Malott and the other gentlemen."

"State of Indiana }
Marion County }

Personally appeared before the undersigned a Notary Public in and for said county and state Frank S. Fishback, who being duly sworn upon his oath, says that the facts stated in the foregoing protest are true as he verily believes.

Further affiant saith not.

Subscribed and sworn to before me this 28th day of May, 1913.

Notary Public.

My Commission expires Sept. 17, 1916."

"Indianapolis, Indiana, May 12, 1913.

Mr. W. P. Manion,
Marion County Assessor,
Indianapolis, Indiana.

Dear Sir:

We enclose herewith our statement of property returned for taxation as of March 1, 1913, showing a total of \$1,223,250.00 as compared with \$1,187,390.00 for 1912. The return is divided as follows:

| Real Estate | Lots | Improvements | Total | |
|-----------------------------|-----------------------|---------------------|---------------------|-------------------|
| As per 1912 assesement..... | \$87,800.00 | \$504,600.00 | \$592,400.00 | |
| Less Lots Sold..... | 1,170.00 | 600.00 | 1,770.00 | |
| | <u>\$86,630.00</u> | <u>\$504,000.00</u> | <u>\$593,010.00</u> | |
| Add Lots Purchased..... | 2,380.00 | | 2,380.00 | |
| | <u>\$89,010.00</u> | <u>\$504,000.00</u> | <u>\$597,630.00</u> | |
| Personal | City | Wayne | Warren | Washington |
| As Per 1912..... | \$558,490.00 | \$17,000.00 | \$16,500.00 | \$3,000.00 |
| | | | TOTAL | |
| 23.5 mains added at | | | | 594.90 |
| \$1,500.00 | 31,250.00 | | | 35.25 |
| | <u>\$593,740.00</u> | <u>\$17,000.00</u> | <u>\$16,500.00</u> | <u>\$3,000.00</u> |
| | | | | 630.24 |
| Total Real Estate | \$593,010.00 | | | |
| Total Personal | 630,240.00 | | | |
| | <u>\$1,223,250.00</u> | | | |

Trusting that the information given herewith is what is required, we are,

Yours very truly,
The Indianapolis Gas Company,
Vice President."

"The Public Service Commission heard evidence upon the petition of the Citizens Gas Company and the Indianapolis Gas Company and upon the remonstrance of the plaintiff, and made a record of its decisions, including a finding of various facts, and an order permitting the execution of the lease referred to in the petition aforesaid, a copy of which lease is hereafter referred to.

"The finding and order of the Commission were duly entered as of October 1, 1913, and read as follows:"

(The Finding and Order of the Public Service Commission of Indiana was copied here. A copy of said Finding and Order is attached to the Bill of Complaint in cause 1844 as Exhibit D and in cause 1950 as Exhibit E.)

"Following the provisions of the order as set out above, the Indianapolis Gas Company filed with the Public Service Commission and with the clerk of the city of Indianapolis a notice of its intention to surrender its franchise rights to occupy the streets of the city of Indianapolis; the defendant Citizens Gas Company has not surrendered its franchise contract with said city and on the day of, 1913, said Indianapolis Gas Company and the defendant Citizens Gas Company executed a lease in conformity with the provisions of the order of the

Public Service Commission, and referred to in the order as above set out, the lease reading as follows:"

(The Lease of September 30, 1913, was copied here. A copy of said Lease is attached to the Bill of Complaint in each of these causes as Exhibit B thereto.)

"That after the entry of the order of the Public Service Commission granting authority to execute the lease mentioned, the plaintiff Fishback filed a petition for a rehearing before said Public Service Commission, which reads as follows:"

"STATE OF INDIANA.

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.

In the matter of the Petition of the Citizens Gas Company of Indianapolis, and the Indianapolis Gas Company for authority to execute lease.

Petition of Frank S. Fishback for Rehearing."

The petitioner, Frank S. Fishbank, one of the parties of record to this proceeding, respectfully petitions the Commission for a rehearing in the above entitled cause on the following grounds:

1. The Public Service Commission was without power or authority to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order as entered and of the lease.

2. The Public Service Commission fixed the rental charge to be paid by the Citizens Gas Company under the lease described in the order without fixing or finding the value of the plant and property to be leased, and without regard to the value of such plant and property.

3. The rental ordered and permitted to be paid by the terms of the order and lease, is unreasonable and unlawful, and will result in a waste and misapplication of the funds, earnings, and property of the Citizens Gas Company, and an irreparable injury to its stockholders and certificate holders.

4. The terms and conditions of the order and of the lease are unreasonable and unlawful, and prejudicial and injurious to the interests and rights of the plaintiff as a stock and certificate holder, and of all others holding shares or certificates of stock in the Citizens Gas Company. They impair the obligation of the contract existing between the company and this petitioner and all other certificate and stock holders.

5. The order of the Commission is unlawful and unreasonable for the reason that the Citizens Gas Company is without power or authority under the law to enter into the lease under the terms and conditions as set forth therein and in the order, for the following reasons:

a. The consent of three-fourths of the holders of the capital stock of the Citizens Company outstanding never has been obtained or given to the making of the lease.

b. The trustee and directors and officers of the Citizens Gas Company are not authorized by law or otherwise to enter into such a lease for a period of ninety-nine years.

c. Such trustees, directors and officers are not authorized by law or otherwise to surrender their power to fix and determine the rates at which gas manufactured by such company hereafter shall be sold, as specified in item 7 of the order of the Commission.

6. The fulfillment of the terms and conditions of the lease and order will render impossible the fulfillment of its contract with the city of Indianapolis, and such order and lease impairs the obligation of the contract between the company and said city as it relates to the taking over and ownership of the property and plant of the Citizens Gas Company by the city.

7. The city of Indianapolis has not given its consent to such lease and has granted no right to the Citizens Gas Company to operate the plant and system of the Indianapolis Gas Company within the city of Indianapolis.

8. The finding and order of the Commission are not sustained by sufficient evidence.

9. The finding and order of the Commission are contrary to law.

1137 "That on the 28th day of November, 1913, the Public Service Commission of Indiana, overruled said petition for a rehearing and entered an order relating thereto as follows:

"STATE OF INDIANA.

PUBLIC SERVICE COMMISSION OF INDIANA.

In re Petition of Citizens Gas Company of Indianapolis and the Indianapolis Gas Company for authority to make lease."

"The Commission having under consideration the motion of Frank Fishback for a new trial in the above entitled cause, and being fully advised in the premises,

It Is Ordered by the Public Service Commission of

Indiana, That said motion be, and the same is now here overruled.

"On the day the order of the Public Service Commission was entered as described, the Citizens Gas Company took possession and control of the plant and system, and all other property of the Indianapolis Gas Company described in said lease, and since then has been and now is operating the same in connection with the system theretofore owned and operated by it.

"The plaintiff alleges that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described upon the terms and conditions of the finding and order of said Commission and upon the terms and conditions specified in the lease, should be set aside and vacated, and the defendants enjoined from carrying out the terms and conditions of such order and lease on the following grounds:

"1. The defendant, Public Service Commission of Indiana, was without power or authority under the law to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order granting such permission and under the terms and conditions of the lease.

"3. The defendant, Public Service Commission of Indiana, fixed the rental charge to be paid by the Citizens Gas Company without regard to the value of the plant and property to be leased, contrary to the provisions of the Shively-Spencer Utility Commission Act, and to the evidence adduced in the hearing of this matter before said Commission.

"4. The rental and fixed charges to be paid as part of the rental ordered and permitted to be paid by the terms of the lease and order, are unreasonable and unlawful, and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company, and an irreparable injury to its stock and certificate holders, including plaintiff.

"7. The order of the Public Service Commission is unlawful and unreasonable, for the reason that the Citizens Gas Company is without power or authority under the law to enter into the lease upon the terms and conditions of the order and lease for the following reasons:

1138 "(a) The consent of the holders of three-fourths (3/4) of the capital stock of the Citizens Gas Company outstanding never has been obtained or given to the mak-

ing of the lease as required by the provisions of the Shively-Spencer Utility Commission Act.

"8. The city of Indianapolis has not given its consent to such lease, and has granted no right to the Citizens Gas Company and that company has no right to operate the plant and system of the Indianapolis Gas Company within the city.

"9. The finding and order of the Commission are not sustained by sufficient evidence.

"10. The finding and order of the Commission are contrary to law.

"Wherefore, for the reasons above stated the plaintiff prays that the finding and order of the Public Service Commission entered as hereinbefore set out, shall be vacated and set aside; that the lease executed by the defendant, Indianapolis Gas Company and Citizens Gas Company, be declared null and void, and that such Commission and such gas companies be restrained and enjoined from carrying out the provisions of such order, finding, and lease; and for all other proper relief."

1139 PLAINTIFFS' STIPULATION EXHIBIT 14.

Fishback vs. Public Service Commission of Indiana, et al.

Amended Second to Tenth Paragraph of Complaint,
Inclusive.

Each of the amended second to tenth paragraphs of complaint, inclusive, was substantially identical with the first paragraph of complaint (Exhibit 13 to this Stipulation), with the exception of the omission of the nine grammatical paragraphs of said first paragraph of complaint immediately preceding the prayer thereof, and the addition of the respective additional allegations set forth below.

Amended Second Paragraph of Complaint.

The additional allegations in the amended second paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreason-

able and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The trustees, directors and officers of the Citizens Gas Company were not authorized by law or otherwise to enter into the agreement to permit the Public Service Commission of Indiana during the term of said lease to fix and determine the rates and charges at which gas produced, transmitted, or sold by the Citizens Gas Company through the properties operated by it or by the Indianapolis Gas Company, should be sold, as fully and completely as if the said Citizens Gas Company had surrendered its license, permit or franchise and received an indeterminate permit as provided in the Shively-Spencer Utility Commission Act."

1140 Amended Third Paragraph of Complaint.

The additional allegations in the amended third paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The Citizens Gas Company is indebted to its stockholders in dividends provided to be paid them under the provisions of its articles of incorporation, by-laws and certificates of stock to an amount equal to 40 per cent of its capital stock; that said defendant can make the payment of the rental and other charges required by the order and lease hereinbefore referred to, only as operating expenses out of the earnings of said company that should be first applied to the payment of said accumulated dividends and accruing dividends; that if such rental charges are so first paid from the earnings of such company, the company will be unable to pay such accumulated unpaid dividends and accruing dividends due and to become due this plaintiff and other stockholders in said company.

"Plaintiff avers that said company will so divert and misapply the earnings of said company, by applying them to the payment of such rental charges and will not pay dividends now owing and that will hereafter accrue and be owing plaintiff and other stockholders in said company, to plaintiff's irreparable injury, unless the order and lease are canceled and set aside by this court and the defendants enjoined from carrying out the provisions thereof."

Amended Fourth Paragraph of Complaint.

The additional allegations in the amended fourth paragraph of complaint were as follows:

"The plaintiff avers that at the time the petition for leave to lease the plant of the Indianapolis Gas Company was granted, such plant included about 375 miles of mains and pipes of various sizes laid in the streets and alleys of the city, together with certain coal gas and water gas plants, used in the manufacture and distribution of artificial gas sold by such gas company. A large part of the mains were old, having been in the ground for twenty years and more, and large portions of them were in bad repair, rotten, weakened by having been buried in the ground for such length of time and by electrolysis. The coal and water gas plants were obsolete and incapable of producing gas at a cost that would enable the producer to sell it at a profit in competition with a plant manufacturing and selling gas produced by modern methods, and within the price fixed by the laws of the State of Indiana.

"The condition of the system of the Indianapolis Gas Company, and the obsolete character of its plants and machinery were such that it has not been able to do a profitable business for many years, has not been able to pay any dividends to its stockholders for twenty years, and has been compelled to borrow money to pay the interest on its bonds and other fixed liabilities.

"Prior to and at the time of the filing of the petition by the defendants as hereafter referred to, the Indianapolis Gas Company was practically insolvent. The capital stock of such company is \$2,000,000, and its bonded indebtedness \$4,833,000, which capitalization is much beyond the actual value of the combined property of said company.

"The plaintiff alleges that a fair, reasonable value of the property taken under the lease by the Citizens Gas Company was and is less than \$4,000,000 and that a fair and reasonable and lawful rental therefor would not exceed

\$240,000 per annum as a maximum; that the defendant, Public Service Commission, fixed a rental charge in said order and lease to be paid by the Citizens Gas Company, amounting to over \$360,000 per year as a minimum.

"Plaintiff alleges that the rental and fixed charges ordered and required to be paid by the terms of the lease and order as hereinbefore set forth are unreasonable and unlawful and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company and irreparable injury to its stock and certificate holders, including plaintiff."

1142 Amended Fifth Paragraph of Complaint.

The additional allegations in the amended fifth paragraph of complaint were as follows:

"Plaintiff alleges that the City of Indianapolis did not assent to or join in the execution of the lease between the two defendant gas companies or approve or assent to the order permitting such lease; that said city has not granted to the Indianapolis Gas Company or the Citizens Gas Company any right to operate the plant and system of the Indianapolis Gas Company in the streets of said city since the surrender by said Indianapolis Gas Company of its franchise rights in said streets, and neither company has any right to so operate such plant and system; that the operation of the plant of the Indianapolis Gas Company in the streets of said city by the Citizens Gas Company is merely at the sufferance of the City of Indianapolis and may be discontinued by said city at any time."

Amended Sixth Paragraph of Complaint.

The additional allegations in the amended sixth paragraph of complaint were as follows:

"The plaintiff avers that the obligation taken on by the Citizens Gas Company under said order and lease, to pay the interest on the bonds and dividends on the stock of the Indianapolis Gas Company for a period of ninety-nine years, impairs the obligation of the contract existing between the Citizens Gas Company and this plaintiff and other stockholders, and between the company and the City of Indianapolis, in the following particulars:

"1. It constitutes such a lien and incumbrance upon the property and earnings of said company, that the company at the end of twenty-five years from the date of its

franchise, can not mortgage such property for the purpose of raising funds from which to pay the stockholders of said company, including this plaintiff, the par value of the stock held by them and the balance of the unpaid accumulated ten per cent annual dividends.

"2. It constitutes such lien and incumbrance upon the property and earnings of said company that the city can not at the end of twenty-five years from the date of the franchise of the company take over the plant and system of the company as provided in section 22 of the franchise of said company, as shown in Exhibit No. 2 hereto attached."

1143 Amended Seventh Paragraph of Complaint.

The additional allegations in the amended seventh paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared void and invalid, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The defendant, Public Service Commission, was without power or authority under the law to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order granting such permission and under the terms and conditions of the lease."

Amended Eighth Paragraph of Complaint.

The additional allegations in the amended eighth paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas

Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The defendant, Public Service Commission of Indiana, fixed the rental charge to be paid by the Citizens Gas Company without regard to the value of the plant and property to be leased contrary to the provisions of the Shively-Spencer Utility Commission Act, and to the evidence adduced in the hearing of this matter before said Commission."

Amended Ninth Paragraph of Complaint.

The additional allegations in the amended ninth paragraph of complaint were as follows:

1144 "Plaintiff avers that after the lease hereinbefore referred to was modified to meet the conditions set forth in the order of the defendant, Public Service Commission, as above referred to, the same was submitted to a meeting of the stockholders of the Indianapolis Gas Company and at a meeting attended by the holders of more than three-fourth of the outstanding capital stock of said company, the execution of such lease as amended and modified was authorized and approved.

"Plaintiff avers that during all the time hereinbefore referred to, the entire capital stock of the Citizens Gas Company was held by and stood in the names of Thomas L. Sullivan, Lucius B. Swift, Thomas H. Spann, Gustav A. Schnull and Henry Kahn, trustees, who held such stock with the powers and subject to all provisions of the Articles of Association of said Citizens Gas Company. That on September 30, 1913, at 2 o'clock p. m., a meeting of said trustees was held, which was attended by Thomas L. Sullivan, Thomas H. Spann, Lucius B. Swift and Henry Kahn. That at such meeting said Henry Kahn introduced and moved the adoption of the following resolution:

'Resolved, That the trustees of Citizens Gas Company of Indianapolis upon consideration of the proposed lease of the plant and property of the Indianapolis Gas Company by the Citizens Gas Company of Indianapolis embodying the modifications therein required by the Public Service Commission of the State of Indiana, do hereby consent to and approve the execution thereof, and do vote all the stock of said company in favor of such lease.'

"Which motion was seconded by Lucius B. Swift and unanimously adopted.

"That thereafter the respective boards of directors of said Indianapolis Gas Company and said Citizens Gas

Company also duly authorized and ratified the execution of said lease.

"That thereupon said lease as thus modified and amended was executed by the respective officers of the defendant gas companies and presented to the Public Service Commission of Indiana, which Commission had thereupon confirmed and approved the same as shown by its order hereinbefore set out.

"Plaintiff avers that the consent of the holders of three-fourths of the capital stock of the Citizens Gas Company outstanding, including this plaintiff, was not obtained or given to the making of the lease."

1145 Amended Tenth Paragraph of Complaint.

The additional allegations in the amended tenth paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company to execute the lease described, upon the terms and conditions therein set out is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reason:

"The trustees, directors and officers of the Citizens Gas Company were not and are not by law or otherwise authorized to enter into such a lease as hereinbefore referred to for a period of 99 years."

1146 PLAINTIFFS' STIPULATION EXHIBIT 20.

Citizens Gas Co., Lessee—Indianapolis Gas Co., Lessor Summarized Statement of Sums Paid by Citizens Gas to or for the Benefit of Indianapolis Gas

| Period | 1. | 2. | 3. | 4. |
|---------------------|------------------|--------------------|----------------|---|
| | Bond Interest | Stock Dividends | All Taxes | Corporate Organ- ization Maint. Fee |
| 10-1/13 to 12-31/13 | | \$ 30,000.00 | \$ 40,545.96 | \$ 75.00 |
| Calendar Year | | | | |
| 1914— | \$ 243,575.00 | 120,000.00 | 52,962.33 | 300.00 |
| 1915— | 252,075.00 | 120,000.00 | 58,113.44 | 300.00 |
| 1916— | 253,650.00 | 120,000.00 | 71,232.44 | 300.00 |
| 1917— | 253,650.00 | 120,000.00 | 72,634.00 | 300.00 |
| 1918— | 253,650.00 | 120,000.00 | 79,064.35 | 300.00 |
| 1919— | 255,525.00 | 120,000.00 | 124,121.61 | 300.00 |
| 1920— | 267,550.00 | 120,000.00 | 150,735.25 | 300.00 |
| 1921— | 267,542.56 | 120,000.00 | 118,583.46 | 300.00 |
| 1922— | 274,952.79 | 120,000.00 | 121,951.07 | 300.00 |
| 1923— | 280,800.00 | 120,000.00 | 141,182.03 | 300.00 |
| 1924— | 280,946.81 | 120,000.00 | 154,627.30 | 300.00 |
| 1925— | 281,400.00 | 120,000.00 | 167,139.49 | 300.00 |
| 1926— | 281,906.77 | 120,000.00 | 160,523.16 | 300.00 |
| 1927— | 311,674.18 | 120,000.00 | 162,527.33 | 300.00 |
| 1928— | 311,700.00 | 120,000.00 | 165,306.70 | 300.00 |
| 1929— | 311,700.00 | 120,000.00 | 170,239.74 | 300.00 |
| 1930— | 311,700.00 | 120,000.00 | 175,461.47 | 300.00 |
| 1931— | 338,091.93 | 120,000.00 | 156,789.81 | 300.00 |
| 1932— | 343,150.00 | 120,000.00 | 155,326.48 | 300.00 |
| 1933— | 343,150.00 | 120,000.00 | 138,075.28 | 300.00 |
| 1934— | 343,150.00 | 120,000.00 | 120,777.11 | 300.00 |
| 1935— | 171,575.00 | 60,000.00 | 61,484.88 | |
| Total | \$6,233,204.48 | \$2,610,000.00 | \$2,819,405.29 | \$6,375.00 |

Summary of Costs

| | |
|------------------------------------|-----------------|
| 1. Bond interest | \$ 6,233,204.48 |
| 2. Stock dividends | 2,610,000.00 |
| 3. All taxes | 2,819,405.29 |
| 4. Corporate maintenance fee | 6,375.00 |
| Total | \$11,668,984.77 |

1147 PLAINTIFFS' STIPULATION EXHIBIT 22.

Resolution of the Board of Public Works
Dated March 20, 1929

"Be It Resolved by the Board of Public Works of the City of Indianapolis, Indiana, that the Citizens Gas Company of Indianapolis, and the officers, directors and board of trustees thereof, be notified that said City, by and through this Board, hereby asserts, claims and demands all rights, title, interests and ownership, of whatever nature or character granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property of said Citizens Gas Company by virtue of—

"1. A certain contract entered into on the 25th day of August, 1905, between the City of Indianapolis, by and through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, which said contract was ratified, confirmed and approved by a certain ordinance passed on August 25, 1905, by the Common Council of said City and known as General Ordinance No. 72, 1905, approved by the Mayor of said City on August 30, 1905, and which said contract was assigned by said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt to the Citizens Gas Company of Indianapolis on May 24, 1906.

"2. The articles of incorporation of the Citizens Gas Company of Indianapolis, and of all amendments to such articles, and all provisions, conditions and agreements in said original articles and amendments.

"3. The certificates issued to the subscribers of the common stock of said Citizens Gas Company, and all provisions, conditions and agreements therein.

"4. All Statutes of this state and other laws relating to the subject matter hereof, and demand be and is hereby made upon said Citizens Gas Company and its officers, directors, and Board of Trustees, that in accordance with the provisions, terms and conditions of said contract, articles of incorporation, certificates, and statutes or other laws relating to the subject matter, and each thereof, said company and its officers and directors use and apply any and all earnings and/or other money or funds available therefor to the payment, retirement, and cancellation of the certificates issued to subscribers of the common stock of said company and to

secure the cancellation of such certificates, as well as the preferred stock thereof, and that the plant, property and assets of said company be conveyed to said City of Indianapolis in accordance with the premises and further that if on August 30, 1930, as provided in said contract and in said articles and in each of them, the amount due or payable to the holders and owners of said certificates and to the holders and owners of the preferred stock of said company has not been paid, and said certificates and preferred stock have not been fully paid and retired, 1148 then the board directors of said company shall mortgage its gas plant and property for such sum as to enable it to pay the holders of the certificates representing the common stock an amount which with what has already been paid, will equal the full amount of such stock with dividends estimated at the rate of ten per centum per annum thereon, together with the amount necessary to reduce any outstanding preferred stock, and with the proceeds thereof, after redeeming any outstanding preferred stock, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such holders of the certificates representing its common stock and convey said plant and property to said City, subject to such mortgage and other legal obligations against said company, said mortgage to bear not to exceed six per cent interest per annum and be payable on or before ten years from its date; and further that said Citizens Gas Company and its officers and directors do and perform all other acts and things necessary and proper to be done and performed to convey said plant, property and assets of said company to said City of Indianapolis in accordance with the premises; and further that nothing herein contained shall be taken or construed as a waiver of the right of said City or of the Department of Public Utilities of said City or of the Utility District of said City, for and on behalf of said City, to furnish and advance to said company funds with which to pay off and discharge any balance due or payable to said certificate holders and holders and owners of preferred stock, but said City hereby expressly reserves the right to furnish and advance such funds for said purpose.

"That a copy of this resolution shall be made, transmitted and delivered to the said Citizens Gas Company of Indianapolis, Indiana, and to its president, general manager, and to each of the directors of said corporation, and also to the Board of Trustees above referred to, in-

cluding its president and each trustee, and service thereof is intended to be and shall be taken as notice to said company and said officers, directors and trustees of the facts, claims and demands herein contained; and the Clerk of the Board is ordered to take receipts for the delivery thereof at the time of delivery and also ordered and directed to spread of record this resolution on the permanent records of this Board and to also spread of record the receipts obtained for said copies.

"Dated this 20th day of March, 1929.

"The Board of Public Works of the City
of Indianapolis, Indiana,

By Theodore H. Dammeyer,
President.

Emsley W. Johnson,
John C. McCloskey.

Attest:

Ernest F. Frick,
Clerk of said Board.'

"The undersigned Clerk of the Board of Public Works of the City of Indianapolis, Indiana, hereby certifies that the foregoing is a full, true and complete copy of a 1149 resolution duly adopted by said Board on the 20th day of March, 1929, and as the same appears upon the records of said Board.

"In Witness Whereof, I have hereunto set my hand and seal this 20th day of March, 1929.

(Signed) Ernest F. Frick,
*Clerk of the Board of Public Works
of the City of Indianapolis.'*

1150 PLAINTIFFS' STIPULATION EXHIBIT 23.

First Resolution of Board of Directors of Citizens
Gas Company Adopted April 3, 1929.

"On motion of Mr. Hornbrook, seconded by Mr. Insley, the following resolution was unanimously adopted:

"Whereas, notice and demand from the City of Indianapolis, have been served on the officers, directors and trustees of Citizens Gas Company of Indianapolis, reading as follows:

(Here the resolution of the Board of Public Works, dated March 20, 1929, was copied in full. A correct copy

of said resolution is attached to Stipulation No. 1 in each of these causes as Exhibit 22 thereto).

"Whereas, the directors of said Citizens Gas Company of Indianapolis desire to make acknowledgment of the receipt of said notice and demand, and a formal statement of the attitude of the Company with reference to the matters therein contained;

"Now, Therefore, Be It Resolved, that the directors of Citizens Gas Company of Indianapolis hereby recognize the trust created by the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts et al, under date of August 25th, 1905, and thereafter assigned to the Citizens Gas Company, and by the Articles of Association of this Company, entered into pursuant to the terms and provisions of said franchise, and the amendments to said Articles of Association thereafter made, and acknowledge the right of the City of Indianapolis to take over the property and assets of said Company pursuant to the terms of said franchise and Articles of Association; subject, however, to the retirement of the certificates representing the beneficial ownership of the common stock of said Company and the preferred stock of said Company, as provided in such certificates and in the Articles of Association of said Company.

"Resolved Further, that the Board of Directors of said Company proceed in all lawful ways to carry out all its obligations to such certificate holders and preferred stockholders, and having discharged such obligations, convey the property and assets of said Company to the City of Indianapolis.

"Resolved Further that the officers of the Company be and they are hereby directed to send a certified copy of these resolutions to the City of Indianapolis, and to transmit a printed copy thereof to all stockholders of the Company."

1151 PLAINTIFFS' STIPULATION EXHIBIT 24.

Second Resolution of Board of Directors of Citizens Gas Company Adopted April 3, 1929.

"On motion of Mr. Hornbrook, seconded by Mr. Insley, the following resolution was unanimously adopted:

"Whereas, it is provided by Article 9 of the Articles of Association of the Citizens Gas Company of Indianapolis as amended, as follows:

"The earnings of said Company, after the payment of operating expenses and taxes, shall be applied, subject to the discretion by law vested in the directors, but which discretion shall not affect the order in which such application shall be made in the following order, to-wit:

"First, to the payment of any accrued and unpaid dividends upon any preferred stock of the company at the time outstanding; Second, to the payment of dividends at the rate of not to exceed 10 per centum per annum upon the common stock, and any unpaid and accrued dividends at the same rate on account of prior years: Third, to the payment in whole or partial payments of the par value of the common stock of the company; provided, however, that when any part of the amount subscribed and paid in by any certificate-holder has been repaid, only the balance unpaid shall thereafter be entitled to receive such dividends of ten per centum per annum."

"Whereas, the Company now has outstanding Two Million Dollars (\$2,000,000) of common stock issued in the name of the Board of Trustees of the Company, and against which certificates representing beneficial ownership have been issued to various parties; and

"Whereas, dividends at the rate of ten per cent (10%) per annum have been paid on account of all of said stock from the date of its issuance up to and including March 31st, 1929;

"Whereas, the Company has quick assets representing a part of the earned surplus of the Company and which are lawfully available for the purpose of making a partial payment upon the principal of the certificates representing the beneficial interest in said common stock in the amount of at least \$400,000, and it is desired that a capital payment in the amount of \$5.00 per share shall be made on May 15th, 1929, to the holders of such certifi-

cates, in addition to the dividend at the rate of ten per cent (10%) per annum for the half-quarter year ending May 15th, 1929;

“Now, Therefore, Be It Resolved,

1152 “(a) That a dividend of one and one-quarter per cent (1-1/4%) is hereby declared upon the Two Million Dollars (\$2,000,000) outstanding common stock of the Company for the half-quarter year ending May 15th, 1929, to be paid May 15th, 1929, to the holders of record of such certificates on May 4th, 1929, and that the stock transfer books representing such certificates be closed from the close of business May 4th, 1929, to May 16th, 1929.

“(b) That a capital payment in the amount of \$5.00 per share be made May 15th, 1929, on account of the Two Million Dollars (\$2,000,000) of certificates outstanding, representing the beneficial interest in the common stock of the Company, to be paid to the record holders of such certificates May 4th, 1929, and that the stock transfer books representing such certificates be closed from the close of business May 4th, 1929, to May 16th, 1929; such capital dividend shall be paid upon presentation of such certificates for endorsement upon the back thereof of the amount of such payment.

“Further Resolved, that any portion of the funds necessary to make said capital payment which shall not have been paid over to the certificate holders on May 15th, 1929, be deposited in special trust with The Union Trust Company of Indianapolis, for the benefit of the several holders of the certificates representing the beneficial ownership of said common stock, to whom such payment has not yet been made, such fund to be withdrawn from time to time by the proper officers of the Citizens Gas Company for the purpose of making payments to the several certificate holders as hereinabove provided.

“Further Resolved, that from and after May 16th, 1929, all right of the several holders of the certificates representing the beneficial ownership of the common stock of this Company, to receive dividends on that portion of the par value of such certificates represented by the capital payment hereby ordered and directed, shall cease.

“Further Resolved, that from and after May 16th, 1929, the foregoing payment on capital account having been made, or provision therefor made, the capital account represented by the common stock of the Company shall be

reduced to the sum of \$1,600,000, and so carried on the books of account of the Company.

“Resolved Further, that from and after May 16th, 1929, all new certificates issued by the Company representing the beneficial ownership of the common stock of the Company, shall contain an endorsement showing partial payment of the principal in the same form and to the same extent as is endorsed upon the certificate surrendered and in exchange for which such new certificate is issued.

1153 “Resolved Further, that a printed copy of the foregoing resolutions be mailed to each and all of the certificate holders with a suitable letter from the officers of the Company, notifying the certificate holders of the action this day taken and requesting them to present their certificates for proper endorsement and partial payment on the 15th day of May, 1929.”

1154 PLAINTIFFS' STIPULATION EXHIBIT 30.

Bill of Complaint in Todd Case.

This bill of complaint is copied on pages 2-72, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Todd v. Citizens Gas Company of Indianapolis, et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

Newton Todd,
Plaintiff,

v.

Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymsen, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans, Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Robert Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Lucius B. Swift, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, City of Indianapolis, L. Ert Slack, as Mayor of the City of Indianapolis, William A. Boyce, Jr., as City Clerk of the City of Indianapolis, Theodore H. Danmeyer, John C. McCloskey, and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis,

Defendants.

No. 1191.
In Equity

BILL OF COMPLAINT FOR INJUNCTION AND TO
QUIET TITLE.

To the Honorable, the Judge of the District Court of the United States for the Southern District of Indiana:

Plaintiff files this, his bill of complaint against all of the above named defendants, and alleges that:

I.

Plaintiff, Newton Todd, is a citizen of the State of Indiana, residing in the City of Indianapolis, in said state. Defendant Citizens Gas Company of Indianapolis is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, with its principal office and place of business in the City of Indianapolis, in said state. Defendant City of Indianapolis is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana. Each of the individual defendants herein, to-wit, John R. Welch, Gustav A. Eforymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Disette, Edgar H. Evans, Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, Henry Kahn, L. Ert Slack, William A. Boyce Jr., Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, is a citizen of the State of Indiana, residing in the City of Indianapolis, in said state.

II.

Plaintiff is the owners of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis; and brings this suit on behalf of himself and all other holders of common stock who may wish to join in this suit and contribute to the expense hereof, asserting corporate rights and immunities of defendant Citizens Gas Company of Indianapolis. This is a suit in equity which arises under the Constitution of the United States, and is brought to enjoin and restrain the threatened deprivation, under color of certain statutes of the State of Indiana, of certain rights, privileges and immunities secured to defendant Citizens Gas Company of Indianapolis, and to plaintiff and other stock holders, by the Constitution of the United States, and to quiet the title of said defendant Company to certain real and personal property, situated within the Southern District of Indiana, against the claims and demands of defendant City of Indianapolis and its officers based upon a certain Franchise and certain Articles of Incorporation, and upon a certain statute of the State of Indiana purporting to legalize such Articles of Incorporation, which statute attempts to deprive defendant Company, the plaintiff and other stock holders of rights, privileges and immunities secured to them by the Constitution of the United

States. The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000).

III.

Defendant L. Ert Slack, since the 1st day of January, 1929, has been, and now is Mayor of defendant City of Indianapolis. Defendant William A. Boyce, Jr., since the 1st day of January, 1929, has been, and now is City Clerk of defendant City of Indianapolis. Defendants Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, since the 1st day of January, 1929, has been, and now are and constitute the Board of Public Works of defendant City of Indianapolis. Defendant John R. Welch, since the 1st day of January, 1929, has been, and now is president and a member of the Board of Directors of defendant Citizens Gas Company of Indianapolis. Defendant Clarence L. Kirk, since the 1st day of January, 1929, has been, and now is vice-president and general manager and a member of the Board of Directors of defendant Citizens Gas Company of Indianapolis. One F. J. Rastenberg, since the 1st day of January, 1929, has been, and now is the secretary defendant Citizens Gas Company of Indianapolis. Defendant Gustav A. Efroymsen, since the 1st day of January, 1929, has been, and now is treasurer and director of defendant Citizens Gas Company of Indianapolis. Defendants John R. Welch, Gustav A. Efroymsen, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette and Edgar H. Evans, since the 1st day of January, 1929, have been, are, and now constitute the Board of Directors of defendant Citizens Gas Company of Indianapolis. Defendants Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan and Henry Kahn, since the 1st day of January, 1929, have been, are, and now constitute the trustees holding in the voting trust provided for in Articles 6, 7, and 8 of the Articles of Incorporation of defendant Citizens Gas Company, certificates evidencing all of the common stock of defendant Citizens Gas Company of Indianapolis, against which have been issued trustees certificates evidencing the entire beneficial ownership of those shares in accordance with the provisions in the Articles of Incorporation of said Company, as hereinafter more fully appears.

IV.

Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necessary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis, Division, and said property, so situated, is more particularly described as follows, to-wit:

* * * * *

“(Here follows detailed description of real estate owned by Citizens Gas Company).”

(Inserted pursuant to stipulation filed November 22, 1939.)

Defendant Company has also acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

V.

Plaintiff became a holder of trustees' certificate No. 12093, dated May 16, 1924, evidencing the entire beneficial ownership of 100 shares of common capital stock of defendant Citizens Gas Company of Indianapolis on or about said date, and has been a holder of said certificate continuously ever since. Plaintiff acquired other similar certificates from time to time thereafter, and now is the owner and holder of trustees' certificates No. 12093, 13230, 13231,

dated May 16, 1924, October 17, 1927, October 17, 1927, respectively, and evidencing, respectively the entire beneficial ownership of 100, 100 and 50 shares of the common capital stock of defendant Company. This suit is not a collusive one to confer on a court of the United States jurisdiction of a suit of which it would not otherwise have cognizance.

VI.

On the 30th day of August, 1905, defendant City of Indianapolis, acting by and through its common council, ratified, confirmed and approved a certain Franchise Contract executed on the 25th day of August, 1905, by the Board of Public Works of the said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns. Said Franchise Contract and the Ordinance ratifying the same are in the following words and figures, to-wit:

• • • • •
“(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I. R. 81-94)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

Said Franchise was published in a book printed and published by authority of the City of Indianapolis, entitled “Charter and Ordinances of the City of Indianapolis,” which said book was published in the year 1905, and which said Franchise appears on pages 289-311, inclusive. Said Franchise was also published in a book printed and published by defendant City entitled “Proceedings of the Common Council of Indianapolis,” which was the journal of said Common Council from October 15, 1903, to December 31, 1905, and said Franchise, and the proceedings of the Common Council relating thereto, appear in said book on pages 795-806, inclusive.

VI-a.

During the year 1905 and prior thereto The Indianapolis Gas Company, an Indiana corporation, was furnishing gas in certain portions of the City of Indianapolis under a franchise from said City. During the year 1905 and until the formation of defendant Citizens Gas Company, The Indianapolis Gas Company was the sole

company furnishing gas in the City of Indianapolis. The rates and service of The Indianapolis Gas Company were unsatisfactory and it was feared that because of its entrenched position it might be able to absorb, through stock ownership, any new competing companies. The purpose of the voting trust provided for in the franchise of 1905 heretofore set out and in the articles of incorporation of defendant Citizens Gas Company hereafter set forth, was to insure that control of defendant Citizens Gas Company should not pass to The Indianapolis Gas Company or its stockholders and to that end it was provided that no Voting Trustee of the Gas Company should be an employee or stockholder of said The Indianapolis Gas Company.

VII.

On the 23d day of May, 1906, defendant Citizens Gas Company of Indianapolis was incorporated under an Act of the General Assembly of the State of Indiana, entitled:

"An Act for the incorporation of manufacturing and mining companies and companies for mechanical, chemical and building purposes,"

approved May 20, 1852, and subsequent amendments thereto. The Articles of Incorporation of said defendant, omitting names, signatures and acknowledgments, were as follows:

.

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I. R. 95-100))."

(Inserted pursuant to stipulation filed November 22, 1939.)

Said Articles of Incorporation were recorded on the 23d day of May, 1906, in the office of the Recorder of Marion County, State of Indiana, in Miscellaneous Record, Vol. 50, beginning at page 96.

VIII.

Thereafter, on the 24th day of May, 1906, the aforesaid Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt assigned and transferred to defendant Citizens Gas Company of Indianapolis all of their rights in the aforesaid Franchise Contract, which assignment was accepted by

defendant Company, and said defendant Company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter alleged.

IX.

Thereafter defendant Citizens Gas Company of Indianapolis proceeded to take subscriptions for its common stock to the full authorized amount of \$1,000,000, and upon payment of said subscriptions defendant Citizens Gas Company issued certificates representing its common capital stock in the following form:

"Incorporated under the laws of the State of Indiana

Citizens Gas Company of Indianapolis

Capital Stock \$1,000,000

| | | |
|--------|---------------------|--------|
| Number | Shares \$25.00 Each | Shares |
|--------|---------------------|--------|

This Certifies that _____
 is the owner of _____
 fully paid shares of the Capital Stock of the par value of \$25.00 per share in the Citizens Gas Company of Indianapolis, to be held by the Board of Five Trustees named in the Articles of Incorporation and their successors as Trustees in accordance with the terms of the Articles of Incorporation of said Company.

A trust Certificate is issued to said Stockholder by said Trustees on surrender of which with proper assignment of same on the books of said Corporation by the aforementioned Stockholder or his attorney, the Trustees of the Citizens Gas Company of Indianapolis will make proper transfer as directed in said assignment.

In Witness Whereof, the said corporation has caused this certificate to be signed by its President and Secretary and to be sealed with the seal of the corporation of Indianapolis, Ind., this _____ day of _____, A. D. 19_____.

President

Secretary

When issued there were inserted in each certificate the name of the owner of the shares and the number of shares represented by said certificate. Said certificates were

placed in the possession and control of the voting trustees who thereupon issued and delivered to each stockholder a certificate representing such shares, which certificate is the document referred to herein as a certificate of beneficial interest in the common stock of defendant Citizens Gas Company. Thereafter on the 25th day of March, 1911, said defendant Company increased its common capital stock from \$1,000,000 to \$2,000,000 face value, the amount of such increase being divided into 40,000 shares of the par value of \$25.00 each, and said defendant Company proceeded to sell and issue said additional \$1,000,000 of common stock in the manner provided in the Articles of Incorporation, and in the sale thereof received a net premium above such face or par value in the sum of \$418,711.28. For said increase of stock said defendant Company issued stock certificates and trustees' certificates in the same manner and form as the stock certificates and trustees' certificates were issued in connection with the original issue of stock of defendant Company. Stock certificates in the above form were issued by defendant Citizens Gas Company for the shares of stock purchased by plaintiff at, or shortly before, the time when the trustees' certificates were issued and delivered to plaintiff, as alleged in Paragraph V of this bill.

X.

Thereafter, the General Assembly of the State of Indiana passed an act entitled

"An Act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission."

Said Act went in force on the 1st day of May, 1913, and is commonly referred to as the "Shively-Spencer Utility Commission Act." Under the terms and provisions of said Act, as amended by Indiana Acts 1921, page 197, in force May 31, 1921, defendant Citizens Gas Company of Indianapolis, on the 27th day of August, 1921, filed with the City Clerk of defendant City of Indianapolis, and with the Public Service Commission of Indiana, a written declaration, legally executed, surrendering its Franchise from the City of Indianapolis and accepting an indeterminate permit in lieu thereof, as provided in said Shively-Spencer Utility Commission Act. Said written declaration and the

certificate of the City Clerk of defendant City of Indianapolis are in the words and figures following, to-wit:

*"Declaration of Surrender of
Licenses, Permits and Franchises*

By

Citizens Gas Company of Indianapolis

This Indenture Witnesseth, That Citizens Gas Company of Indianapolis, a corporation duly organized and existing under the laws of the State of Indiana, and which is the owner and operator of by-product gas plants in the City of Indianapolis, Indiana, and is a public utility, declares that it hereby surrenders each and every license, permit and franchise from the city of Indianapolis, Indiana, now owned or held by it and under or by virtue of which said Company is operating its gas utility or any part thereof, in said city; and hereby accepts indeterminate permits in lieu of said licenses, permits and franchises hereby surrendered as provided in the Act of the General Assembly of the State of Indiana entitled "An Act concerning public utilities creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and acts amendatory thereof or supplemental thereto; but if said act shall be repealed or annulled, then said Company shall be reinstated in the possession and enjoyment of all the licenses, permits and franchises hereby surrendered as provided in said Act.

In Witness Whereof, the said Citizens Gas Company of Indianapolis has this 12th day of August, 1921, caused its name to be hereunto subscribed by its President and its corporate seal hereto affixed, attested by its Secretary duly authorized thereto by resolutions of the stockholders and directors of said Company, duly adopted at meetings of said stockholders and directors duly called and held.

Citizens Gas Company of Indianapolis,

By John R. Welch,

President.

Attest:

John D. Forest,

Secretary.

Certificate.

This is to certify that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis filed in the office of the Clerk of the city of Indianapolis, Indiana, a declaration, of which the above is an exact copy.

Geo. Hutsell,

Clerk of the City of Indianapolis."

Thereafter certain proceedings were had before the Public Service Commission of Indiana in a matter entitled "In the matter of the declaration of surrender of licenses, permits and franchises by the Citizens Gas Company of Indianapolis," numbered 6178. In said proceedings, the Public Service Commission of Indiana made an order on the 12th day of December, 1921, which order is in the following words and figures, to-wit:

"On August 27, 1921, the Citizens Gas Company of Indianapolis filed with the Commission its declaration of surrender of its franchise with the City of Indianapolis, said declaration being in the usual form and executed in conformity to the law of Indiana in such cases made and provided.

On August 30, 1921, Ira Chase Koehne, on his own behalf and on behalf of all other consumers of the said Citizens Gas Company, filed his objection to the surrender of said franchise by said Citizens Gas Company, the specific objections set out being as follows:

First: That the Citizens Gas Company is not a public utility;

Second. That said Company forfeited its contract with said City on May 4, 1921, when it began to receive a price for its gas in excess of that provided for in its contract and franchise with the City of Indianapolis, and by reason thereof had no franchise to surrender on said 27th day of August, 1921;

Third. That the Acts of the Legislature of 1913 and 1921 concerning surrender of franchises are each unconstitutional.

After due notice this cause was heard in the rooms of the Commission on December 6, 1921.

It is wholly useless for the Commission to go into a detailed examination of the specific objections hereinbefore set out, for the reason that the petitioner is only attempting to surrender whatever franchise it may have with the City of Indianapolis. If it has no franchise the

objectors can in no way be prejudiced or harmed by the declaration of surrender on the part of petitioner. If, on the other hand, petitioner has a franchise with the City of Indianapolis, it has the power to surrender the same and receive in lieu thereof by operation of law, an indeterminate permit as defined by the statutes of the State of Indiana.

If the objectors have any rights in the premises herein, their remedy is through the courts and not through this Commission.

This Commission is not a court, although in certain matters its acts are quasi-judicial. The formal order written in surrender of franchises is a mere acknowledgment of the filing of such surrender and a finding that the surrender was made in conformity to the provisions of the law applicable thereto. The order of the Commission therefore neither adds to nor detracts from the sanctity of the declaration of surrender.

The Commission therefore, of its own motion, dismisses the objections filed by the said Ira Chase Koehne, and being fully advised in the premises, finds that said Citizens Gas Company of Indianapolis, Indiana, has filed its written declaration, as provided by the Public Service Commission Act, surrendering all licenses, permits and franchises from the City of Indianapolis, Indiana, now owned or held by the petitioner herein in accordance with the provisions of said Act and that said Company receives in lieu thereof, by operation of law, an indeterminate permit to be held under all the terms, conditions and limitations of said Act.

It Is Therefore Ordered by the Public Service Commission of Indiana, that said declaration and all instruments in writing filed by said Company in the matter shall be filed in the office of the Secretary of the Commission and kept on file as a record of said surrender.

Defendant City had notice of the above proceedings but took no steps to join with those objecting to the surrender of said franchise. Defendant City took no steps of any kind to oppose the surrender of said franchise and acceptance of said indeterminate permit and did not at the time of said surrender and acceptance, or defendant Company's right to operate under said indeterminate permit, or make any objection thereto, but on the contrary acquiesced in said surrender and acceptance of said indeterminate permit and the operation by defendant Company under said indeterminate permit until defendant City on

the 20th day of March, 1929, took action as hereinafter alleged.

As a result of the aforesaid surrender of said Franchise and acceptance of said indeterminate permit, the original contract between defendant City of Indianapolis and defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled, and a new contract was substituted therefor, the terms of which were and are prescribed in said Shively-Spencer Utility Commission Act.

X-a.

On and before the 27th day of August, 1921, the Citizens Gas Company was in serious financial embarrassment. It had been found impossible to earn a sufficient sum from the sale of gas at sixty cents per thousand cubic feet to pay matured debts and operating expenses, semi-annual dividends at the rate of ten per cent per annum, and to make and pay for such extensions and betterments as were ordered by the Board of Public Works of the defendant City of Indianapolis, or as were necessary to meet the needs of the inhabitants of said City and of defendant Citizens Gas Company. According to the books of defendant Citizens Gas Company the total current assets aggregated on the 30th day of June, 1921, \$2,704,108.41, and included cash and deposits \$207,647.99; accounts receivable, \$295,450.20; notes receivable, none; materials and supplies \$944,128.34; and saleable products, \$1,256,881.88; and on said date current liabilities aggregated \$2,303,993.04, and included accounts payable, \$394,737.67; short time notes payable to banks for money borrowed to finance operation, \$1,520,511.89; and trade acceptances payable, \$388,743.48. Due to the unsatisfactory operations of defendant Citizens Gas Company it was impossible for said Company, so long as it continued to operate under the provisions of its franchise to borrow more money on bonds or to market any stock in order to obtain additional working capital. The paid-in surplus of said Company of \$418,711.28 had been impaired to the extent of \$323,714.22, and on said date amounted to \$94,997.06. By reason of general business conditions then prevailing, it was impossible to dispose of the items of materials and supplies, and saleable products, except at prices far below the figures at which they were carried, as above stated. Said condition continued to be substantially the same until said surrender of the franchise and acceptance of the

indeterminate permit. By reason of the aforesaid condition, on August 27, 1921, defendant Citizens Gas Company was in imminent danger of insolvency.

XI.

On the 27th day of August, 1921, defendant Citizens Gas Company of Indianapolis filed in the office of the Secretary of State a document, which, omitting signatures and acknowledgments, is in the following words and figures, to-wit:

• • • • •
“(Here follows a certificate of amendment to the Articles of Incorporation of Citizens Gas Company, filed August 27, 1921, which appears as part of Exhibit C to the bill (1 R. 112-116)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

Said document was also filed for record on the 27th day of August, 1921, in the office of the Recorder of Marion County, State of Indiana, and was placed of record in said office in Miscellaneous Record Vol. 121, at page 32.

XI-A.

The statutes under which defendant Citizens Gas Company was incorporated, and in force when the above quoted amendments to its original Articles of Incorporation were purported to be made, contained no sanction or authority for any of the provisions contained in said original Articles, or in the attempted amendments thereto, relating to the payment of certificate holders or the transfer or conveyance of the plant and property of defendant Company to defendant City; and all such provisions, and particularly Articles 9, 10 and 12, both in their original and amended form, were and are mere surplusage, and null, void and of no effect. Furthermore, said defendants Voting Trustees were wholly without authority to execute the purported certificate of amendment to said Articles of Incorporation, or to cause the same to be adopted or filed on behalf of defendant Company, and had no authority or right under any terms of said voting trust or said original Articles of Incorporation to vote the stock of the Company, or to take any other steps, which would extend, increase or otherwise modify their powers as Vot-

ing Trustees, or to make any new or amended agreement affecting the rights or the property of said Company or its stockholders, and for said reason said purported amendments to said Articles were and are invalid, void and of no effect.

XII.

Defendant Citizens Gas Company of Indianapolis now has outstanding first mortgage bonds in the amount of \$3,404,000, bearing interest at 5% per annum; and has outstanding preferred capital stock in the face amount of \$1,000,000, entitled to cumulative dividends at 5% per annum; and has outstanding common stock in the face amount of \$2,000,000, entitled to dividends at 10% per annum, payable semi-annually. It is not possible that the net earnings of defendant Company from January 1, 1929, to August 30, 1930, will be sufficient, together with existing earned surplus, to redeem and retire the preferred stock of defendant Company according to the terms and conditions thereof, and thereafter to pay to the holders of certificates of beneficial interest in the common stock of said Company an amount equal to the face value thereof, together with interest thereon at the rate of 10% per annum. The individual defendants, directors and trustees of defendant Company, having knowledge of the financial condition of the Company and of the facts aforesaid, have not undertaken, nor asserted that they would undertake, to pay to said certificate holders of common stock the entire face value thereof, with dividends thereon at 10% per annum, pursuant to Section 1, Clause (g) of the Franchise Contract, repeated in Article X of the Articles of Incorporation. Defendant City, knowing that it could not become entitled, under the terms of Section 1, Clause (g) of the Franchise, repeated in Article X of the Articles of Incorporation, to a conveyance of the plant and property of defendant Company on or before August 30, 1930, proceeded, through its Board of Public Works, to assert its alleged right and option to acquire the plant and property of defendant Company, as provided by Section 22 of the aforesaid Franchise, repeated in Article XII of the Articles of Incorporation of said Company, by adopting the resolution of March 20, 1929, and by serving the same, including the notice and demand therein contained, upon said defendant Company, its trustees and directors, as hereinafter set forth.

XIII.

Thereafter, during the early part of the year 1929, defendant City of Indianapolis, acting through its Board of Public Works, Legal Department, and special counsel employed expressly for the purpose of bringing about the conveyance of the plant and property of defendant Citizens Gas Company of Indianapolis to defendant City in accordance with the terms of the original Franchise Contract, in part repeated in said Articles of Incorporation heretofore referred to, prepared a bill to be submitted to the Seventy-sixth General Assembly of the State of Indiana, for the purpose of securing the enactment of said bill into a statute to assist defendant City in acquiring the plant and property of defendant Company. Said bill was introduced in the House of Representatives of said General Assembly by members thereof residing in said City of Indianapolis and elected from Marion County, in said State of Indiana. Said bill is entitled:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill thereafter passed both branches of said General Assembly in the exact form prepared and submitted by said counsel for defendant City without change or amendment of any kind or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and said act became a law on said day. Said act was directed solely at the Articles of Incorporation of defendant Company, and by the terms of said act, said General Assembly of the State of Indiana purported to legalize the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis in order that defendant City might assert successfully the right to obtain the plant and property of defendant Company on payment to hold-

ers of certificates of beneficial interest in the common stock of said Company the face value of their certificates plus dividends at ten per cent per annum, all as provided in said original Franchise Contract between defendant City of Indianapolis and defendant Citizens Gas Company of Indianapolis and repeated in part in the Articles of Incorporation of defendant Company.

XIV.

On the 20th day of March, 1929, the defendant City of Indianapolis, acting by and through its Board of Public Works, passed a resolution asserting its right to acquire the plant and property of the defendant Citizens Gas Company of Indianapolis under the provisions of the Franchise and the Articles of Incorporation hereinbefore set out. Said resolution was in the following words and figures, to-wit:

.

“(Here follows the resolution adopted by the Board of Public Works on March 20, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 22).”
(Inserted pursuant to stipulation filed November 22, 1939.)

Defendant City of Indianapolis, through its agents and employees, served a copy of said resolution upon the defendants constituting the Board of Directors of the defendant Citizens Gas Company of Indianapolis and upon the defendants constituting the Board of Trustees of defendant Citizens Gas Company of Indianapolis, on said 20th day of March, 1929.

XV.

On the 3rd day of April, 1929, the directors of defendant Citizens Gas Company of Indianapolis, in meeting assembled, adopted a resolution designated as “Resolution No. 1,” purporting to acknowledge the claim of right asserted in the aforesaid notice and demand of said City, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, which Resolution No. 1 is in the words and figures following:

.

“(Here follows the first resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929,

a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 23)."

(Inserted pursuant to stipulation filed November 22, 1939.)

At the same meeting, said Board of Directors adopted a second resolution designated as "Resolution No. 2," purporting to authorize the payment from the surplus of the defendant Company of \$5.00 as a "capital dividend" upon each share of the common capital stock of defendant Company, to be paid to the persons holding the certificates evidencing the beneficial ownership of said shares of common stock respectively. Said Resolution No. 2 is in the following words and figures:

.

"(Here follows the second resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 24)."

(Inserted pursuant to stipulation filed November 22, 1939.)

The aforesaid action of said Board of Directors in response to the demand of said City of Indianapolis is in violation of the rights of defendant Citizens Gas Company of Indianapolis and of all owners of common stock in said defendant Company, including this plaintiff, in the particulars hereinafter set forth.

XVI.

Each of said resolutions adopted by said Board of Directors on April 3, 1929, as aforesaid, was approved by the Board of Trustees of defendant Citizens Gas Company of Indianapolis, by a resolution adopted at a meeting of said Board on said April 3, 1929, and the resolution adopted by said Board of Trustees, approving said resolutions, is in the following words and figures:

"Whereas, the directors of the Citizens Gas Company of Indianapolis have this day adopted resolutions reading as follows: (Here the trustees inserted the directors' resolutions replying to the city's demand), and

"Whereas, such resolutions were adopted in joint meeting with this board of trustees and the form of such resolutions was agreed upon by both the trustees and directors; now therefore be it

"Resolved, that the board of trustees of the Citizens Gas Company of Indianapolis hereby recognize the trust

created by the franchise referred to in the resolutions adopted by the board of directors, by the assignment thereof to the Citizens Gas Company and by the articles of association and the amendments thereto and acknowledge the right of the City of Indianapolis to take over the property and assets of said Citizens Gas Company pursuant to the terms of said franchise and articles of association, subject to the retirement of the certificates representing the beneficial ownership of the common stock of said company and the preferred stock of said company. And be it further

"Resolved, that this board of trustees hereby adopts and confirms the resolutions adopted by the board of directors of said company as a correct statement of the attitude of the board of trustees with reference to the matters therein contained. And be it further

"Resolved, that said board of trustees of the Citizens Gas Company of Indianapolis proceed in all lawful ways to carry out all the obligations of said company to its certificate holders and preferred shareholders, and that upon the discharge of said obligations the property and assets of said company be conveyed and transferred to the City of Indianapolis and that said conveyance be made as soon as that can reasonably be done. And be it further

"Resolved, that Thomas L. Sullivan, chairman of the board of trustees, be authorized and empowered to transmit a true copy of these resolutions, as adopted by the board of trustees, to the City of Indianapolis."

Said action of said Board of Trustees is in violation of the rights of defendant Citizens Gas Company of Indianapolis and of all owners of the common stock therein, including this plaintiff, in the particulars hereinafter set forth.

VII.

Prior to the filing of this bill of complaint, and on the 26th day of April, 1929, plaintiff served upon defendants constituting the Board of Trustees of defendant Citizens Gas Company of Indianapolis, a demand in writing, by which plaintiff demanded of said Board of Trustees that they demand of the Board of Directors that said Board of Directors cause defendant Citizens Gas Company of Indianapolis to assert certain rights. Plaintiff's demand upon said Board of Trustees is in the words and figures following, to-wit:

To Gustav A. Schnull, Robert Lieber, Lucius B. Swift,
Thomas L. Sullivan, Henry Kahn,

Constituting the Board of Trustees holding legal title in and to all shares of the common capital stock of Citizens Gas Company of Indianapolis, in trust for the holders of certificates of beneficial interests in such common stock.

You and each of you are notified hereby:

That I, the undersigned, holder of certificates representing the entire beneficial interest in 250 shares of the common capital stock of Citizens Gas Company of Indianapolis, on behalf of myself and all other holders of certificates of beneficial interest in the common stock of the Citizens Gas Company of Indianapolis, without confirming or acknowledging the existence of any title, power or authority in you as trustees or in any other capacity, and without decreasing or waiving any rights, legal or equitable, in such common stock which certificate holders may have possessed heretofore, or may now or may hereafter possess, respectfully request and demand that you, as record holders in trust of the common stock of said Citizens Gas Company of Indianapolis, take action as follows:

1. That you rescind the resolution adopted by you on the 3rd day of April, 1929, approving Resolution Number 1 and Resolution Number 2, adopted by the Board of Directors of said corporation on said date, and notify the officers and directors of said corporation of your action in rescinding your said resolution.

2. That you serve upon the Board of Directors and officers of said Citizens Gas Company of Indianapolis a written notice of protest and objection, therein protesting and objecting

- (a) To the adoption by said Board of Directors, on April 3, 1929, of the resolutions designated as Resolution Number 1 and Resolution Number 2.

- (b) To the recognition or acknowledgment by said Board of Directors or by said officers, then, now or hereafter that there was created, has existed, and now exists or may hereafter exist a trust for any purpose whatsoever either by virtue of the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts, et al., under date of August 25, 1905 (afterwards assigned to Citizens Gas Company of Indianapolis), or by virtue of recitals contained in either the original or amended Articles of Incorporation of Citizens Gas Company of Indianapolis.

(c) To the recognition or acknowledgment by said Board of Directors or by said officers, then, now or hereafter, that there exists in the City of Indianapolis any right to acquire, at any time, any of the property of Citizens Gas Company of Indianapolis, except in accordance with the terms and conditions prescribed by the Shively-Spencer Utility Commission Act of the State of Indiana.

(d) To the performance or the taking of any steps looking to the performance by said Board of Directors or by the said officers of any of the acts referred to and described or proposed in said Resolution Number 1 and said Resolution Number 2.

3. That you serve upon the Board of Directors and officers of said Citizens Gas Company of Indianapolis a written request and demand, therein requesting and demanding

(a) That said Board of Directors rescind and cancel the aforesaid Resolution Number 1 and Resolution Number 2 and enter such action upon the records of the said Company.

(b) That said Board of Directors make reply to the notice served upon it by the City of Indianapolis, which notice is in such Resolution Number 1 described and, in such reply, expressly deny the assertion, claim and demand of said City that any rights, title, interest and/or ownership of any nature or character whatsoever have been granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property or in and to any property of said Citizens Gas Company of Indianapolis by virtue of either the certain ordinance franchise of August 25th, 1905, or the said Company's original or amended Articles of Incorporation or the certificates issued to the subscribers of the common stock of the said Company or by virtue of any other writing or document or by virtue of any statute or law.

(c) That said Board of Directors and officers institute and prosecute to final judgment in any court of competent jurisdiction a suit in equity or action at law or any other legal proceeding which may be proper to have declared wrongful and void and to quiet title against any and all claims of the City of Indianapolis in and to any of the property, real or personal, of Citizens Gas Company of Indianapolis, and that said Board of Directors and said officers take all and such other steps as may be required

to remove any clouds upon the title in and to the Company's said property.

4. That you, as the owners in trust of the common stock of Citizens Gas Company of Indianapolis, in behalf of yourselves as such trustees and in my behalf and in behalf of all other holders of certificates of beneficial interest in the common stock of said corporation, take all steps necessary to protect the said corporation against any claim of the City of Indianapolis to and against the title of any of the property and assets of said Citizens Gas Company of Indianapolis, and if Citizens Gas Company of Indianapolis, its Board of Directors and officers fail, neglect or refuse to take the steps requested and demanded in accordance with the foregoing, that you, as holders of the legal title in the common stock of said corporation, proceed to exercise all stockholders' rights, by instituting suit or any other proper legal proceeding to have declared null and void, and to quiet the title of the Corporation against, any such claim or assertion of such claim by the City of Indianapolis to or against any of the property or assets of said Citizens Gas Company of Indianapolis, and to prevent the carrying out of any of the said claims of said City or the performance or attempted performance of any of the acts or purposes described in the aforesaid Resolution Number 1 and Resolution Number 2.

Because of the emergency existing by reason of the notice heretofore served by the City of Indianapolis upon Citizens Gas Company of Indianapolis, its Board of Directors and officers, and by reason also of the action with reference thereto by said Board of Directors, I ask respectfully a prompt reply hereto, setting forth your position and intentions in connection with the foregoing demands. On failing to hear from you within a reasonable time, I shall assume that no action is by you to be taken and shall, as the owner of the equitable interest in the common stock represented by my certificates, proceed to take such action as may be necessary to protect and establish all of such rights of said corporation, of its stockholders, and of the holders of certificates of beneficial interests in the common stock of said corporation.

Dated this 26th day of April, 1929.

(Signed) Newton Todd.

Said Board of Trustees denied plaintiff's demand, and failed and expressly refused to take the action requested

of them in said demand, and notified plaintiff of such refusal on the 27th day of April, 1929.

XVIII.

Thereafter and on the 27th day of April, 1929, plaintiff served upon defendants constituting the Board of Directors of defendant Citizens Gas Company of Indianapolis, a written demand that said Board of Directors enforce the rights of defendant Citizens Gas Company of Indianapolis which plaintiff is asserting in this bill of complaint. Said demand is in the following words and figures, to-wit:
To

Citizens Gas Company of Indianapolis.

The Board of Directors of Citizens Gas Company of Indianapolis.

James I. Dissette, G. A. Efroymsen, Edgar H. Evans, J. H. Hooker, H. H. Hornbrook, William H. Insley, Franklin Vonnegut, Clarence L. Kirk and John R. Welch, who constitute the Board of Directors of Citizens Gas Company of Indianapolis.

John R. Welch, President of Citizens Gas Company of Indianapolis.

C. L. Kirk, Vice-President of Citizens Gas Company of Indianapolis.

G. A. Efroymsen, Treasurer of Citizens Gas Company of Indianapolis.

F. C. Rastenburg, Secretary of Citizens Gas Company of Indianapolis.

L. M. Edwards, Assistant Secretary of Citizens Gas Company of Indianapolis.

V. V. Smith, Assistant Treasurer of Citizens Gas Company of Indianapolis.

You and each of you are notified that I, the undersigned, holder of certificates representing the entire beneficial interests in 250 shares of the common capital stock of Citizens Gas Company of Indianapolis, respectfully object to and protest against the certain actions heretofore taken and proposed hereafter to be taken by Citizens Gas Company of Indianapolis, its Board of Directors, and officers, in the following particulars, to-wit:

1. In adopting, at a meeting of the Board of Directors, on April 3, 1929, the resolution designated as Resolution Number 1.

2. In recognizing, by such resolution or otherwise, then,

now or hereafter, that there was created a trust for any purpose whatsoever by the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts, et al., under date of August 25th, 1905 (afterwards assigned to Citizens Gas Company of Indianapolis), or that there now exists or may exist hereafter any such trust by virtue of such franchise.

3. In recognizing, by such resolution or otherwise, then, now or hereafter, that there was created a trust for any purpose whatsoever by either the original Articles of Incorporation or by the Amended Articles of Incorporation of Citizens Gas Company of Indianapolis, or that there now exists or may exist hereafter, any such trust by virtue of such Articles of Incorporation.

4. In acknowledging, by such resolution or otherwise, then, now or hereafter, the existence of any right of the City of Indianapolis to take over the property and assets of said Company pursuant to the terms of said franchise and/or of such Articles of Incorporation, either subject to the retirement of the certificates representing the beneficial ownership of the common stock of said Company and subject to the retirement of the preferred stock of said Company or upon any conditions whatsoever, except such as are prescribed by the terms and provisions of the Shively-Spencer Utility Commission Act.

5. In proceeding or proposing to proceed, in any manner or form whatsoever, now or hereafter, either before or after carrying out any of the Company's obligations to such certificate holders and preferred stockholders, to convey the property and assets of said Company to the City of Indianapolis, except in accordance with the terms and conditions provided in the Shively-Spencer Utility Commission Act.

6. In adopting, at a meeting of the Board of Directors, on April 3, 1929, the Resolution designated as Resolution Number 2.

7. In proposing to make or hereafter making, from the assets of said Company, a capital payment in the amount of five dollars (\$5.00) per share on account of the Two Million Dollars (\$2,000,000.00) of certificates outstanding, representing the beneficial interest in the Common Stock of the Company, to be distributed to the record holders of such certificates.

8. In proposing to receive or hereafter receiving presentation of any of such certificates for endorsement thereon of the amount of any such proposed capital payments

or in proposing to make or hereafter making any such endorsements upon such certificates.

9. In proposing to appropriate or hereafter appropriating from the assets of the said company and withdrawing from its proper corporate uses and depositing with the Union Trust Company of Indianapolis or with any other bank, trust company, person, firm or corporation any moneys whatsoever for the purpose of making any capital payments to certificate holders as in said Resolution Number 2 provided.

10. In declaring, claiming, recognizing, acknowledging or asserting by said resolution or by any other form of resolution or corporate action, then, now or hereafter that from and after May 16, 1929, or from any other date, any or all right of the several holders of the certificates representing the beneficial ownership of the common stock of said Company, to receive dividends on that portion of the par value of such certificates represented by such capital payment, in such Resolution Number 2 described, shall cease; or that the capital account represented by the common stock of the Company shall be reduced to the sum of One Million Six Hundred Thousand Dollars (\$1,600,000.00) or to any other sum below Two Million Dollars (\$2,000,000.00) or carried on the books of account of said Company in any amount below Two Million Dollars (\$2,000,000.00); or that there should be placed any endorsements or additional recitals upon new certificates issued by the Company representing the beneficial ownership of the common stock of the Company.

11. In recognizing, acknowledging or asserting, in any manner or form, that the City of Indianapolis possesses any right, title or interest, legal or equitable, vested or unvested, contingent or otherwise, in any of the property or assets, real or personal, belonging to Citizens Gas Company of Indianapolis.

The objections and protest herein contained are addressed separately to each of the actions above specified, and are based upon each of the following reasons:

1. Any rights and claims in and to any of the property or assets of Citizens Gas Company of Indianapolis asserted to exist in the City of Indianapolis by virtue of the recitals of any franchise or Articles of Incorporation as amended or otherwise, always have been and are illegal, invalid and void.

2. Any right and claims in and to any of the said Company's property or assets asserted to exist in the City of Indianapolis by virtue of the terms of any franchise ordinance or by virtue of any other written instrument were terminated and rescinded by the action of the State of Indiana in accepting the surrender by such Company of such franchise and the issuance, in lieu thereof, on December 15, 1921, of an Indeterminate Permit in accordance with the Shively-Spencer Utility Commission Act of the General Assembly of the State of Indiana.

3. Because of the foregoing and other reasons, good and sufficient in law, all claims of said City in and to any of the assets of said Company are null and void, cast a cloud upon the said Company's title to its property, depreciate the value of shares of the Company's common capital stock and thereby do great wrong and injury to the undersigned as well as to all other holders of certificates of beneficial interests in such stock.

Wherefore, I do now request and demand that you and each of you take corporate action as follows:

1. Rescind and cancel the aforesaid Resolution Number 1 and Resolution Number 2 and enter such action upon the records of the said Company.

2. Make reply to the notice served upon you by the City of Indianapolis, which notice is in such Resolution Number 1 described, and, in such reply, expressly deny the assertion, claim and demand of said City that any rights, title, interest and/or ownership of any nature and character whatsoever have been granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property or in and to any property of said Citizens Gas Company of Indianapolis by virtue of either the certain ordinance franchise of August 25th, 1905, or the said Company's original or amended Articles of Incorporation or the certificates issued to the subscribers of the common stock of the said Company or by virtue of any other writing or document or by virtue of any statute or law.

3. That you institute and prosecute to final judgment in any court of competent jurisdiction a suit in equity or action at law or any other legal proceeding which may be proper to have declared wrongful and void and to quiet title against any and all claims of the City of Indianapolis

in and to any of the property, real or personal, of Citizens Gas Company of Indianapolis and that you take all and such other steps as may be required to remove any clouds upon the title in and to the Company's said property, and to prevent the carrying out or the attempt to carry out now or hereafter, any claims of said City to any of the property of said Citizens Gas Company.

In view of the notice of assertions of claim to title heretofore made by the City of Indianapolis and of actions taken by the Board of Directors of said Company, and the emergency arising by reason thereof, I ask respectfully a prompt reply to the matters contained herein, and, upon failure to receive the same within a reasonable time, I shall proceed to take such action as, in my opinion, will protect and safeguard the property of the Company against the illegal claims of the City of Indianapolis.

Dated this 26th day of April, 1929.

(Signed) Newton Todd.

Said Board of Directors denied plaintiff's said written request and failed and expressly refused to take the action requested therein to be taken, and notified plaintiff of such refusal on the 27th day of April, 1929. Plaintiff has made no effort, other than as heretofore alleged, to secure action from the common stockholders of defendant Citizens Gas Company of Indianapolis, for the reason that said Board of Trustees claims the exclusive right to vote all of the common stock of defendant Citizens Gas Company of Indianapolis, including the right to elect the Board of Directors thereof, and having so refused to act for the protection of the stockholders, as heretofore alleged, any further demand upon the body of common stockholders of defendant Company would have been futile and unavailing.

XIX.

The original agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and the defendant Citizens Gas Company of Indianapolis, which was contained in and evidenced by the aforesaid Franchise Contract and in part repeated in the Articles of Incorporation of said Company, was in all respects rescinded, abrogated and annulled, and a new agreement between said State and said defendant Company was substituted therefor, by the voluntary act of said Com-

pany in accepting the offer to enter into a new agreement made by the State to defendant Company in said Shively-Spencer Utility Commission Act, which said acceptance was evidenced by the surrender by defendant Company of the aforesaid Franchise, and the receiving, in lieu thereof, of an indeterminate permit under the terms and provisions of said Shively-Spencer Utility Commission Act. The effect of the foregoing was the creation of a new contract between the State and the defendant Company. One of the terms of said new agreement was that, in lieu of the right of defendant City of Indianapolis to acquire the plant and property of Citizens Gas Company of Indianapolis, as provided in Sections 1, 2, 22 and 23 of said Franchise Contract and in part repeated in Articles X and XII of said Articles of Incorporation, defendant City should have the right to acquire the property of defendant Company under the terms and conditions, and at its then value, as determined and prescribed by the Public Service Commission of Indiana, and defendant Company relinquished all of the rights and remedies secured to it by its former contract with defendant City, and thereafter possessed only such rights and remedies as were granted to it under the Shively-Spencer Utility Commission Act. In so far as the Articles of Incorporation of defendant Company were inconsistent with said new agreement, they were by implication modified by the Shively-Spencer Utility Commission Act to conform to the provisions thereof; and Articles X and XII of the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis were completely abrogated, rescinded, annulled and superseded by said new agreement arising out of the acceptance by defendant Company of the aforesaid indeterminate permit. The passage by the General Assembly of the State of Indiana of said legalizing act of 1929 purporting to revive and legalize all of the provisions of said Articles of Incorporation, and particularly those in respect to the mode of acquisition of the plant and property of defendant Citizens Gas Company of Indianapolis by defendant City of Indianapolis, constitutes and is an impairment of the obligations of the aforesaid new contract between the State and the defendant Company in violation of Article I, Section 10, of the constitution of the United States, and in violation of Article I, Section 24, of the Constitution of Indiana, and said legalizing act is therefore void and of no effect.

XX.

The aforesaid legalizing act of 1929 denies to defendant Citizens Gas Company of Indianapolis the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that it makes certain facts a basis for classification in order to enact, under the guise of a general law, a special law directed at and applicable to defendant Citizens Gas Company of Indianapolis alone. The distinctions made by said act, in order to render it applicable to defendant Citizens Gas Company of Indianapolis alone, are based upon mere differences and have no reasonable or substantial relation to the purpose of the act in respect to which the classification is proposed. Said differences and arbitrary distinctions, the possible purposes thereof, and the reasons why each of said differences and distinctions is arbitrary and irrational, are as follows, viz.:

(a) Said act applies only to certain corporations organized prior to May 1, 1913, and implies that the reason for selecting said date is that May 1, 1913, was the date of the creation of the Public Service Commission of this State under said Shively-Spencer Utility Commission Act. The only rational ground that can be suggested for selecting such time as a basis of classification is that corporations organized prior to that date ought not to be under the control of the Public Service Commission. That said alleged ground has no basis in reason is shown by the fact that the Shively-Spencer Utility Commission Act in Section 101 thereof provided that any utility organized prior to the date of said Act might bring itself voluntarily under the terms of said Act by filing a written declaration of the surrender of its franchise and taking in lieu thereof an indeterminate permit. In the original Section 101 of said Shively-Spencer Utility Commission Act, utilities organized prior to May 1, 1913, were required to file said surrender prior to July 1, 1917. The General Assembly of the State of Indiana extended the time for filing said surrender by Acts 1915, page 110, and further extended the time for filing said surrender by Acts 1921, Chapter 93, thereby establishing the legislative policy of the State of Indiana as favoring the bringing under the terms of the Shively-Spencer Utility Commission Act all public utility corporations organized prior to May 1, 1913, and the attempt on the part of said legalizing act to alter said legislative policy

for corporations having certain charter provisions is wholly irrational and arbitrary.

(b) Said legalizing act of 1919 contains the following provision, viz.:

"That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be, valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns."

The only rational purpose for a general statute legalizing a provision such as that referred to in the above quoted part of said act would be that, when a public utility has made a contract with a municipality under which such municipality has the right under certain conditions to acquire its property, such contract should be enforced. Said legalizing act does not purport to legalize all contracts between municipalities and public utility companies which contain provisions for the transfer or conveyance of the property of such public utility to the municipality, but only such contracts as are contained in articles of incorporation of a corporation of the type described in said act. Said agreements are much more frequently contained in franchises than in articles of incorporation, and in legalizing only such agreements contained in articles of incorporation, said legalizing act makes a classification which is based upon a mere difference and which has no reasonable or rational relation to the only possible lawful end to be secured by such legalizing act.

(c) Said legalizing act further provides as follows:

"and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city."

The general law in force with regard to the acquisition of public utility property by a municipality in the State of Indiana is found in an Act entitled "An Act concerning municipal corporations," approved March 6, 1905. Section 93 of said act, in so far as material, provides as follows:

"The Board of Public Works shall have power: * * *

Eighth. To purchase within or without the limits of such city, and to construct, by contract or otherwise, and to operate, water works, gas works, electric light works, heating and power plants, steam and power houses and lines, for the purpose of supplying such city and the inhabitants thereof with the use and convenience of such works, or to purchase or hold a majority of the stock in corporations organized for any of the above purposes; and to purchase within or without the limits of such city, lands or other property for such purposes; Provided, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same, and after an election had in relation thereto, as hereinafter provided."

Section 249 of said act, as amended by the General Assembly of the State of Indiana in 1915, provides:

"Any city or town may erect or construct water works, gas works, electric light works, heating, steam and power plants, or combination of such utilities, together with all building, lines and accessories necessary thereto, and may purchase or lease any such works and utilities already constructed or in course of construction, and owned by any other persons; and may also purchase, condemn or lease other lands for said purposes, and may also extend, change and improve such works and utilities when so acquired, all for the purpose of furnishing the inhabitants of such city or town and vicinity thereof with the use and convenience of any or all of such utilities: Provided, That before any city or town shall enter upon the policy of erecting and constructing any such new works and utilities, or the purchase of the same from other persons, the common council of

such city or the board of trustees of such town, as the case may be, shall adopt a resolution, designated by number, declaring the necessity for entering upon the policy of such erection and construction or purchase. In case of the proposed erection and construction of new works, said declaratory resolution shall fix the general character and the probable maximum cost thereof; and in case of the purchase of such works from other persons, such common council or board of trustees shall first procure an option from the owners of such works, agreeing to sell the same upon the terms of a definite proposed contract of sale, upon approval thereof by popular vote, and a full copy of said proposed contract of sale shall be incorporated in, and made a part of, said declaratory resolution. Before such declaratory resolution is confirmed and the policy thereof entered upon, said common council or board of trustees shall submit the same to the qualified voters of such city or town, at a special or general election, of which election previous notice shall be given by publication once each week for two weeks in some newspaper printed and of general circulation in such city or town, and if there be no such newspaper, then in some newspaper printed and of general circulation in the county in which such city or town is situated, the first of said publications to be at least twenty days prior to the day fixed for such election. The tickets for such election shall have printed thereon, in separate lines, the following phrases:

'For declaratory resolution Yes' and 'Against declaratory resolution No', designating the number of resolution submitted, or other similar phrases by which the voter may effectually express his choice upon the question submitted; and each phrase shall have printed to the left thereof a voting square, by marking in which square, the voter shall express his choice; and such elections shall otherwise be governed by the general election laws of the State of Indiana, so far as applicable. If such resolution be submitted at a general election of such city or town, the tickets therefor shall be printed upon and at the bottom of the general tickets containing the names of candidates at such election. If a majority of the votes cast at such election be in favor of such resolution, such common council or board of trustees may, by ordinance, confirm such resolution and proceed to execute the policy thereof; but if a majority of such votes be opposed to such resolution, then such common council or board of trustees shall have no power to confirm the same or to execute the policy thereof. Such

city or town is hereby authorized, for the purpose of procuring the means to acquire the aforesaid works and utilities, or to improve the same when acquired, as herein-before authorized, to issue and sell the bonds of such city or town pursuant to and in conformity with the provisions of section 55 of this act."

Since the Legislature has deemed it desirable that an election should be held to determine whether any municipal corporation will acquire a utility plant, the mere fact that articles of incorporation of a utility operating within the municipality contain stipulations empowering the municipality to acquire its plant under certain conditions, offers no basis for dispensing with an election to determine whether or not the municipality will acquire such property; and the attempted creation of such an exception on such grounds is arbitrary and based on a mere difference and amounts to a denial to defendant Citizens' Gas Company of Indianapolis and its stockholders of the equal protection of the laws.

(d) Said legalizing act further provides:

"It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer."

The general law in force with regard to the acquisition of public utility property by a municipality in the State of Indiana, where utilities are operated under the provisions of the Public Service Commission Law, as is defendant Citizens Gas Company of Indianapolis, is found in said Shively-Spencer Utility Commission Act, and more particularly in Section 102 thereof, which provides as follows:

"Sec. 102. Any public utility accepting or operating under any indeterminate license, permit or franchise hereafter granted shall by acceptance of any such indeterminate license, permit or franchise be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate at the value and under the terms and conditions determined by the commission as provided in this act, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are pro-

vided in this act and shall have been deemed to have consented to the revocation of its license, permit or franchise by the commission for cause."

If the Legislature deemed it desirable that the purchase of the plant and property of a public utility and the terms of such purchase should be approved by the Public Service Commission, the fact that the articles of incorporation of a utility operating within a municipality contain provisions that the municipality may acquire said plant and property under certain conditions, offers no basis in reason for dispensing with the approval of said Public Service Commission, nor the adoption of any other and different rule than if said option were contained in a franchise, contract or other document other than articles of incorporation, and the attempted creation of such exception on the foregoing grounds is arbitrary and irrational, and based upon a mere difference, and is a denial to defendant Citizens Gas Company of Indianapolis and its stockholders of the equal protection of the laws.

XXI.

Said legalizing act of 1929, in so far as it purports to legalize the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis and make them binding upon said defendant Company and enforceable by defendant City of Indianapolis, with respect to the provisions and terms upon which said defendant City would have a right to acquire the plant and property of defendant Company, deprives defendant Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, because the agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and defendant Citizens Gas Company of Indianapolis, contained in said franchise and in part repeated in said Articles of Incorporation, was abrogated by the ~~surrender of~~ said franchise by defendant Company and the acceptance, in lieu thereof, of an indeterminate permit under the Shively-Spencer Utility Commission Act, one of the terms of which indeterminate permit was that the defendant City could only acquire the plant and property of defendant Company at its then value and under the terms and conditions determined by the Public Service Commission of Indiana; and said legalizing act purports to authorize defendant City to enforce conveyance and to require defendant Company to convey upon the terms fixed in said Franchise and in part

repeated in said Articles of Incorporation, to-wit, upon the receipt by the stockholders and holders of certificates of beneficial interest, either from earnings of the company, or from money paid by defendant City, or from the proceeds of a mortgage to be placed upon the property of defendant Company at the request of defendant City, of the face value of their stock and/or certificates of beneficial interest, together with the stipulated dividends thereon, which sum is far less than said defendant Company, and indirectly said stockholders and/or holders of certificates of beneficial interest, including plaintiff, would receive if defendant City were to acquire the plant and property of defendant Company as provided for in said Shively-Spencer Utility Commission Act.

XXII.

Said legalizing act of 1929, in so far as it attempts to legalize and make enforceable the provisions of the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis with respect to the right of the City of Indianapolis to require a conveyance of the plant and property of defendant Company, is in violation of Article I, Section 21, of the Constitution of Indiana, because it permits said State of Indiana, through the agency of the City of Indianapolis, to take private property without just compensation, in that the agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and defendant Citizens Gas Company of Indianapolis, contained in said Franchise and in part repeated in said Articles of Incorporation, was abrogated by the surrender of such Franchise by defendant Company and the acceptance, in lieu thereof, of an indeterminate permit under the Shively-Spencer Utility Commission Act, one of the terms of which indeterminate permit was that defendant City could only acquire the plant and property of defendant Company at a price equal to its then value as fixed by the Public Service Commission of Indiana; and said legalizing act purports to authorize defendant City to enforce conveyance and to require defendant Company to convey upon the terms fixed in said Franchise and in part repeated in said Articles of Incorporation, to-wit, upon the receipt by the stockholders and holders of certificates of beneficial interest, either from earnings of the Company, or from money paid by defendant City, or from the proceeds of a mortgage to be placed upon the property of defendant Company at the request of defendant City, of the face value of

their stock and/or certificates of beneficial interest, together with the stipulated dividends thereon, which sum is far less than said defendant Company, and indirectly said stockholders and/or holders of certificates of beneficial interest, including plaintiff, would receive if defendant City were to acquire the plant and property of defendant Company as provided for in said Shively-Spencer Utility Commission Act.

XXIII.

Plaintiff and numerous other persons, subsequent to the issuance of said indeterminate permit in 1921 and prior to the passage of said legalizing act of 1929, purchased, acquired still hold and own certificates of beneficial ownership in the common stock of defendant Citizens Gas Company of Indianapolis, having paid therefor amounts far in excess of what their value would have been if the said City had possessed the right thereafter to acquire the Company's property in the manner now asserted by said City. Said legalizing act, in so far as it purports to validate and make binding upon defendant Company certain of the aforesaid invalid and non-binding provisions of said Articles of Incorporation after the rights of plaintiff and the said other certificate holders had vested, deprives them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and takes private property without just compensation in violation of Article I, Section 21, of the Constitution of the State of Indiana, and grants to certain citizens or classes of citizens, namely, the defendant City, privileges or immunities which, upon the same terms, do not equally belong to all citizens, in violation of Article I, Section 23, of the Constitution of the State of Indiana.

XXIV.

Said legalizing act of 1929 not only purports to legalize articles of incorporation containing the provisions therein stated, but also purports to grant to municipal corporations power to acquire the property of a public utility without submitting the question of the acquisition of said property to a general election, and also purports to remove determination of the terms of acquisition of such utility property from the jurisdiction of the Public Service Commission. Said act does not deal with but one subject and the matters properly connected therewith, but deals with three

separate and unrelated subjects, viz., (a) the legalizing of said Articles of Incorporation, (b) the powers of said municipal corporations, and (c) the jurisdiction of the Public Service Commission, and as such is in violation of Article IV, Section 19, of the Constitution of the State of Indiana, and is void.

XXV.

By reason of the facts heretofore alleged in paragraph XX of this bill, which are hereby referred to and by reference made a part of this paragraph, said legalizing act of 1929 grants to certain citizens or classes of citizens, viz., defendant City of Indianapolis, privileges or immunities which, upon the same terms, do not equally belong to all citizens, and said legalizing act of 1929 constitutes special legislation aimed solely at defendant Citizens Gas Company of Indianapolis in violation of Article I, Section 23, of the Constitution of the State of Indiana.

XXV-A.

By reason of the facts heretofore alleged in paragraph XX of this bill, which are hereby referred to and by reference made a part of this paragraph, said legalizing act of 1929 attempts to create a corporation, not a banking corporation, by special act, and not under general laws, in violation of Article XI, Section 13, of the Constitution of the State of Indiana.

XXVI.

The provisions in Section 1, Clause (g) of the aforesaid Franchise Contract of August 30, 1905, and repeated in Article X of the Articles of Incorporation of defendant Company, that the gas plant and property of said Company shall be conveyed to said City when the said certificate holders shall have received by dividends or otherwise the face value thereof with interest thereon at the rate of ten per cent per annum purports to create an interest in real and personal property to vest upon a contingency which might occur at a time more remote from the date of the creation of such right, than the period of a life or lives then in being and twenty-one years thereafter, and such provisions were in violation of the common law of the State of Indiana and are now and at all times have been

illegal, null, void and unenforceable by defendant City of Indianapolis.

XXVII.

The option or right of defendant City of Indianapolis to demand the conveyance of the property of the Citizens Gas Company of Indianapolis, under the provisions of Sections 1, 2 and 22 of the aforesaid Franchise Contract of August 30, 1905, and in part repeated in Article XII of the Articles of Incorporation of defendant Gas Company, by its terms might be exercised at a time more remote from the date of the creation of such option or right than the period of a life or lives then in being and twenty-one years thereafter, and is in violation of the common law of the State of Indiana and is now and at all times has been illegal, null, void and unenforceable by defendant City of Indianapolis.

XXVIII.

Under the provisions of the aforesaid Franchise, in part repeated in said Articles of Incorporation, defendant City of Indianapolis claimed an option or right to acquire the property of defendant corporation on or before the expiration of the term and period of said Franchise. The term and period of said Franchise expired on the 27th day of August, 1921, when said Franchise was surrendered by defendant Company, and in lieu thereof an intermediate permit was accepted under the terms and provisions of the Shively-Spencer Utility Commission Act. The defendant City took no steps to exercise the alleged option at or prior to said 27th day of August, 1921, and in truth and fact took no steps whatever looking toward the acquisition of said plant and property until the 20th day of March, 1929, at which time the term and period of said Franchise had long since expired, and the attempt on said 20th day of March, 1929, to exercise said option was and is of no effect, because the period within which said option must, by its terms, have been exercised, terminated on the 27th day of August, 1921.

XXIX.

Under the terms and provisions of Sections 100, 101, 102, 105 and 106 of said Shively-Spencer Utility Commission Act, defendant City of Indianapolis is without the power to purchase or acquire a public utility, except according to the terms and conditions fixed by the Public Service Commission of Indiana. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of the plant and property of defendant Company, nor determined the value of said plant and property, nor affixed the terms and conditions of such acquisition. The demand of defendant City upon the officials of defendant Citizens Gas Company of Indianapolis, as heretofore set forth, is therefore *ultra vires* and void.

XXX.

At the time of the execution and approval of the aforesaid Franchise, and of the incorporation of defendant Citizens Gas Company of Indianapolis, and of the service upon defendant Company and its directors and trustees of the demand of the Board of Public Works, heretofore referred to, there was and is now in force in the State of Indiana an act entitled "An Act concerning municipal corporations," approved March 6, 1905. By the express provisions of Section 93 (Eighth) and Section 249 of said Act, before any municipality could lawfully construct or acquire the property of a public utility, it was and is necessary to submit the question of said construction or acquisition to popular vote at a special or general election under the terms and restrictions contained in said Section 249. At no time has the question of the acquisition of the plant and property of defendant Company by defendant City been submitted to popular vote of the electors of said City under the terms and restrictions of said Section 249. Said attempt, on the part of defendant City, to acquire said plant and property of defendant Company, is therefore *ultra vires* and void.

XXXI.

Said directors of defendant Company have caused the aforesaid resolutions to be printed and mailed to all holders of the certificates evidencing ownership of the beneficial interest in the common capital stock of defendant Company, including this plaintiff, and have caused said resolutions No. 1 and No. 2 to be published in newspapers in the City of Indianapolis and elsewhere, and have publicly expressed their intentions of acceding to the demands of defendant City and of conveying the plant and property of defendant Company to defendant City in accordance with the foregoing notice and demand, notwithstanding that the only method by which said property may lawfully be transferred from defendant Company to defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act. Said directors and trustees will carry out said threats, and will pay said "capital dividend," and will convey said plant and property of defendant Company, pursuant to said demand by defendant City, unless restrained and enjoined from such action.

XXXII.

The aforesaid record of said Franchise and Articles of Incorporation, and the purported amendments thereto, under date of August 27, 1921, and the aforesaid acts, proceedings, and threatened acts and proceedings of defendants City of Indianapolis, Citizens Gas Company of Indianapolis and the other defendants herein, create a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property, greatly impair the value thereof, and render the sale of said property at an adequate price impossible, and impair the value of the stock and certificates of beneficial interest therein held by plaintiff and all others in a similar situation.

XXXIII.

The aforesaid notice and demand of defendant City of Indianapolis and the acquiescence therein of the individual defendants, constituting the Board of Directors and the Board of Trustees of defendant Citizens Gas Company of Indianapolis, will, if carried into effect, compel defendant

Company to convey its property at a tremendous loss, and compel plaintiff and all others in like situation to accept the sum of \$25 per share in full satisfaction of all their rights as holders of certificates of beneficial interest in the common stock of defendant Company, instead of a much larger sum, the amount of which is uncertain and unknown and can only be ascertained by a valuation of the plant and property of defendant Company by the Public Service Commission of Indiana, as provided in the Shively-Spencer Utility Commission Act. The amount of said damage is large and cannot be definitely ascertained, and by reason of the aforesaid facts, the action of defendant City of Indianapolis and of the other defendants herein has caused, and is causing great and irreparable injury and damage to defendant Citizens Gas Company of Indianapolis and the plaintiff, and all others in a similar situation.

Prayer.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law and can obtain relief only in a court of equity, plaintiff prays:

1. That writs of subpoena be issued to each of the defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That defendant City of Indianapolis and defendants L. Ert Slack, as Mayor of the City of Indianapolis, William A. Boyce, Jr., as City Clerk of the City of Indianapolis, Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis, and their successors in office be each and all forever enjoined, after final hearing, from asserting any right, title or interest, present or future, in and to any of the property of defendant Citizens Gas Company of Indianapolis by virtue of the aforesaid Franchise, and/or Articles of Incorporation, and/or by virtue of the apparent force of said legalizing act of 1929, or from attempting to acquire the same in any manner other than pursuant to the terms and conditions of the Shively-Spencer Utility Commission Act.

3. That defendant Citizens Gas Company of Indianapolis and defendants Welch, Efroymsen, Hornbrook, Insley, Kirk, Hooker, Vonnegut, Dissette, Evans, Schnull,

Lieber, Swift, Sullivan and Kahn, and their successors in office, be forever restrained and enjoined, after final hearing, from carrying into effect the provisions of the aforesaid Resolutions No. 1 and No. 2, and the resolution of the Board of Trustees heretofore referred to, and from paying a capital dividend of \$5.00 per share, or any other amount, upon the common stock of defendant Citizens Gas Company of Indianapolis, or upon the certificates of beneficial interest in said stock, and from taking any steps of any kind or character, acknowledging, admitting or recognizing any right in, or asserted by, defendant City of Indianapolis, its officers, agents or employees, now or hereafter, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, other than in the manner and subject to the terms and conditions prescribed by the Shively-Spencer Utility Commission Act.

4. That this Court order and decree that the claims of defendant City of Indianapolis of any right, now or hereafter, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, under the aforesaid Franchise and/or Articles of Incorporation, and/or by virtue of the apparent force of said legalizing act of 1929 are illegal, unfounded and without right, and constitute a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property aforesaid, and that the title of defendant Citizens Gas Company of Indianapolis to its said plant and property be quieted and forever set at rest as against said illegal and unfounded claims of defendant City of Indianapolis, its officers, agents, attorneys, servants and employees.

5. That this Court grant to plaintiff such other and further relief as may be deemed proper in the premises.

Barnes & Johnson,

Matson, Carter, Ross & McCord,

Solicitors for Plaintiff.

Frederick E. Matson,

Earl B. Barnes,

Austin V. Clifford,

Of Counsel.

(Signed) Frederick E. Matson
Earl B. Barnes
Austin V. Clifford

State of Indiana, }
 Marion County. } ss.

NEWTON TODD, being first duly sworn, upon his oath says:

That the matters and facts stated in the foregoing bill of complaint are true as he is informed and verily believes.
 (Signed) Newton Todd.

Subscribed and sworn to before me this 30th day of April, 1929.

(Signed) Thelma Geis,
 (Seal) Notary Public.

My Commission Expires Jan. 25, 1931.

1155 PLAINTIFFS' STIPULATION EXHIBIT 31.

Answer of City of Indianapolis, et al., in Todd Case.

This answer is copied on pages 115-152, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Todd v. Citizens Gas Company of Indianapolis, et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

* * (Caption) * *

SEPARATE AND SEVERAL ANSWER OF DEFENDANTS, CITY OF INDIANAPOLIS; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY, AND EMSLEY W. JOHNSON, AS AND CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFF'S BILL OF COMPLAINT.

City of Indianapolis; L. Ert Slack, as Mayor of the City of Indianapolis; William A. Boyce, Jr., as City Clerk of the City of Indianapolis; Theodore H. Dammeyer, John C. McCloskey, and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis,

defendants in the above cause, for answer to plaintiff's bill of complaint, say:

1. These answering defendants admit all the allegations contained in each of the following numbered subdivisions of plaintiff's bill of complaint numbered One, Four, Six, Seven, Fourteen, and Seventeen.

2. These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis, but allege that although there was delivered to the Trustees of the Citizens Gas Company certificates reciting that the plaintiff was the owner of shares of stock in said Citizens Gas Company, in the form set forth in Subdivision IX of the complaint herein, such certificates were at all times held by the Trustees of the Citizens Gas Company subject to the provisions of the Articles of Association of said company as set out in Subdivision VII of the complaint herein, and the only interest in said stock held by the plaintiff was that evidenced by the certificates of beneficial ownership issued to the plaintiff by the Trustees of said Citizens Gas Company in the form set out in Subdivision 15 of this answer. Pursuant to the plan as established at the time of the organization of said Citizens Gas Company, for the purpose of carrying out the limitations upon the interest of subscribers to the capital stock of the Citizens Gas Company and establishing the public charitable trust in and to the property of said Citizens Gas Company, as more particularly alleged in Subdivision 15 of this answer, all the stock of said Citizens Gas Company was delivered to the Trustees of said Citizens Gas Company of Indianapolis, and trustees' certificates representing the beneficial interest of the subscribers were issued to all subscribers to the capital stock of said company and to their several assignees, including the plaintiff herein, and neither the plaintiff nor any person similarly situated ever had, or claimed the right to hold, or requested the possession of, any stock certificate of said company or any other evidence of his interest therein than such trustees' certificates representing their beneficial interest; and these defendants allege that plaintiff acquired and holds said certificates and each of them subject to all the terms and conditions of the ordinance and franchise set out in Subdivision Six of plaintiff's bill of complaint, originally granted to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, and by said individuals assigned to

defendant Citizens Gas Company on the 24th day of May, 1906, of the original Articles of Association of said Citizens Gas Company set out in Subdivision Seven of plaintiff's bill of complaint and the amendments thereto set out in Subdivision Eleven of plaintiff's bill of complaint, of the provisions contained in said trustees' certificates and **subscriptions** for the common capital stock of the Citizens Gas Company, as hereinafter in Subdivision 15 of this **answer set out** and also subject to all the terms and conditions of a public charitable trust created in the property of the Citizens Gas Company of Indianapolis in favor of the City of Indianapolis in trust for the inhabitants and/or gas consumers of said city as more specifically alleged in Subdivision 15 of this answer.

These answering defendants further admit that plaintiff brings this suit on behalf of himself and all others claiming similar rights in the common stock of the Citizens Gas Company, defendant hereto, who may wish to join in this suit and contribute to the expense thereof, and that plaintiff is attempting to assert corporate rights and immunities of defendant Citizens Gas Company of Indianapolis; these answering defendants further admit that the amount in controversy herein exceeds, exclusive of interests and costs, the sum or value of \$3,000.00.

These answering defendants admit that this is a suit in equity, but deny that it arises under the Constitution of the United States and deny that there has been any threatened deprivation under color of any statute of the State of Indiana of any rights, privileges or immunities secured to the defendant Citizens Gas Company of Indianapolis or to plaintiff or others similarly situated by the Constitution of the United States.

These answering defendants further admit that plaintiff seeks in this action to quiet the title of said defendant Citizens Gas Company of Indianapolis to certain real and personal property situated within the Southern District of Indiana as against the claims and demands of the City of Indianapolis and its officers, but deny that the claims so asserted are based exclusively upon a certain franchise and Articles of Incorporation and an Indiana statute purporting to legalize such Articles of Incorporation and allege that the bases upon which said claims are asserted are more fully set forth in Subdivisions 15 and 16 of this answer. These answering defendants deny that the statute referred to deprives the defendant Citizens Gas Company of Indianapolis, the plaintiff or others similarly situated

of any rights, privileges or immunities secured to them by the Constitution of the United States.

3. These answering defendants admit all of the averments contained on Subdivision Three of the plaintiff's bill of complaint except the averment that the trustees of the Citizens Gas Company hold the stock of said Company in the voting trust provided for in Articles 6, 7 and 8 of said Citizens Gas Company, answering which these defendants allege that said trustees hold said stock not only in a voting trust but subject to all the terms and conditions of the trust in the property of the Citizens Gas Company, as set out in the Articles of Association of said Company, and as hereinafter set out in Subdivision 15 hereof, and except the averment that the trustees' certificates issued to the plaintiff and other holders thereof evidence the entire beneficial ownership of the shares of stock represented thereby, but on the contrary aver that the holders of said beneficial certificates acquired and hold the same subject to all of the terms and conditions heretofore set out in Subdivision 2 of this answer and hereafter set out in Subdivision 15 hereof.

4. These answering defendants admit that there were issued to the plaintiff the certificates of beneficial ownership described in Subdivision Five of the plaintiff's bill of complaint at the times herein stated and further admit that this suit is not a collusive one to confer on a court of the United States jurisdiction over a suit of which it would not otherwise have cognizance, but deny that by reason of the issuance of such certificates the plaintiff acquired the entire beneficial ownership of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis, but on the contrary allege that plaintiff at the time he acquired said certificates and continuously since such time was bound by all the terms and conditions more particularly set forth in Subdivisions 2 and 15 of this answer.

4a. These answering defendants for answer to the averments of Subdivision VIa of the plaintiff's complaint admit that during the year 1905 and prior thereto the Indianapolis Gas Company, an Indiana corporation, was furnishing gas in certain portions of the City of Indianapolis, but whether under a franchise, these defendants have no knowledge and leave plaintiff to make proof thereof if deemed necessary; they further admit that during the year 1905 and until the formation of Citizens Gas Com-

pany the Indianapolis Gas Company was the sole company furnishing gas in the City of Indianapolis.

As to the allegation in said complaint, that the rates and service of the Indianapolis Gas Company were unsatisfactory and that it was feared that because of the entrenched position it might be able to absorb through stock ownership any new competing companies, these defendants have not sufficient knowledge to admit or deny the same, but leave the plaintiff to make proof thereof.

These defendants deny that the purpose of the voting trust provided for in the franchise of 1905, as set out in the complaint and in the Articles of Incorporation of the Citizens Gas Company, as set out therein, was to insure that control of defendant Citizens Gas Company should not pass to the Indianapolis Gas Company or its stockholders, and that to that end it was provided that no Voting Trustee of the Citizens Gas Company should be an employee or stockholder of said Indianapolis Gas Company, but on the contrary these defendants allege that such voting trust had for its primary object, and was one of the means of carrying out, the public charitable trust in the property of the Citizens Gas Company as hereinafter alleged.

5. These answering defendants admit the averments contained in Subdivision Eight of the plaintiff's bill of complaint except they do not admit that after the surrender of the franchise of the Citizens Gas Company and the acceptance by said company of an indeterminate permit that the rights of the certificate holders or the City of Indianapolis were in any way changed or affected so far as the public charitable trust in the property of the Citizens Gas Company is concerned.

6. These answering defendants admit the averments contained in Subdivision IX of the plaintiff's bill of complaint, averring that the defendant Citizens Gas Company took subscriptions for its common stock and upon payment of such subscriptions, issued certificates representing its common stock in the form set out in said Subdivision, and that the name of the subscriber and number of shares represented by said certificate were written into such certificates, and that such certificates of stock were placed in the possession and control of the voting trustees, who thereupon issued and delivered to each stockholder, a beneficial certificate, but these defendants deny that such beneficial certificates represented the ownership of said shares of common stock, but only the restricted interest therein

of the beneficial certificate holders, all as more particularly set out in Subdivision 15 of this answer.

These defendants further admit the allegations of said Subdivision of plaintiff's complaint, alleging the increase in the common stock of defendant company and the sale thereof in the manner provided in the Articles of Association of the corporation and the amount of net premium above the face value received therefor; they further admit that for such increase the defendant company issued stock certificates and trustees certificates in the same manner and form as such certificates were issued in connection with the original issue, and defendants further admit that stock certificates in the form above referred to were issued by the Citizens Gas Company for the shares purchased by plaintiff at or shortly before the time when the trustees' certificates were issued and delivered to plaintiff, as alleged in Subdivision IX of the complaint, but allege that such stock certificates did not evidence any absolute ownership in the plaintiff of such shares of stock, but only a restricted interest therein, as more particularly hereinafter set forth.

7. These answering defendants admit the averments contained in the Tenth Subdivision of plaintiff's bill of complaint to the effect that the Shively-Spencer Utility Commission Act became effective May 1st, 1913; that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis, defendant hereto, filed in the office of the Clerk of the City of Indianapolis the written declaration set out in said subdivision of said answer and that in Cause No. 6178 the Public Service Commission of Indiana entered the written order set out in said paragraph of plaintiff's bill of complaint.

These answering defendants admit that the defendant City of Indianapolis had notice of the proceedings looking to the surrender of the franchise of the Citizens Gas Company and the acceptance of an intermediate permit by that company; that the defendant city took no steps to oppose the surrender of said franchise or the acceptance of said permit and did not at that time or at any time since dispute the legality of such surrender and acceptance or the defendant company's right to operate under said indeterminate permit and made no objection thereto, but acquiesced in such surrender and acceptance and the operation by the defendant company under said indeterminate permit; but these answering defendants deny that such surrender of said franchise or the acceptance of said inde-

terminate permit in any way affected the right of the City of Indianapolis to acquire the plant and property of the defendant Gas Company or the public charitable trust created in favor of the inhabitants and gas consumers of said city and refer the court to Subdivision 17 of this answer wherein is specifically alleged the effect of the surrender of said franchise.

These answering defendants deny that as a result of the certificate so filed by the defendant Citizens Gas Company of Indianapolis and of the action taken by the Public Service Commission of Indiana with respect thereto that the original contract between the City of Indianapolis and the defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled and a new contract substituted therefor, the details of which were and are prescribed in said Shively-Spencer Utility Commission Act, but on the contrary aver that the public charitable trust created in the property of the Citizens Gas Company, as hereinafter more particularly set out in Subdivision 15 of this answer was in no way affected, altered or changed by the surrender of said franchise and the taking out of said indeterminate permit.

7a. These answering defendants admit the averments contained in Subdivision Xa of the complaint, that on or before the 27th day of August, 1921, the Citizens Gas Company was in serious financial embarrassment and that it had been found impossible to earn a sufficient sum from the sale of gas at Sixty Cents (60¢) per thousand cubic feet to pay maturing debts and operating expenses, semi-annual dividends at the rate of 10% per annum, and to make and pay for such extensions and betterments as were ordered by the Board of Public Works of the defendant City of Indianapolis, or as were necessary to meet the needs of the inhabitants of said City and the defendant Citizens Gas Company; they further admit that according to the books of said company, the current assets and liabilities and the amount of paid-in surplus as it has originally existed and as it was on June 30, 1921, were as set out in said subdivision of the complaint. These defendants deny that due to unsatisfactory operations of the said Citizens Gas Company it was impossible for said company, so long as it continued to operate under the provisions of its franchise, to borrow more money on bonds, or to market any stock in order to obtain additional working capital, and they deny that by reason of general business conditions then prevailing it was impossible to dispose of the items of materials

and supplies (although they admit the same as to certain salable products) except at prices far below the figures at which they were carried, and that said condition continued to be substantially the same until said surrender of the franchise and acceptance of an indeterminate permit, and that by reason of such conditions, on August 27, 1921, said company was in imminent danger of insolvency, but on the contrary these defendants say that the financial condition of the company as it then existed did not in any wise arise from the fact that it was operating under said franchise, nor was such condition relieved through the surrender of said franchise in August, 1921, but on the contrary such condition arose from the inadequate rate of 90¢ per thousand cubic feet, which was then being received by said company for gas and which financial condition was changed for the better not as a result of the surrender of such franchise, but as a result of the action of said company instituted in the year 1922, in the United States District Court for the District of Indiana, through which compensatory rates were secured for the use of the property of said company devoted to public service.

8. These answering defendants admit that the Citizens Gas Company of Indianapolis filed in the office of the Secretary of State the document set out in Subdivision Eleven of plaintiff's bill of complaint and further alleged that said document is a certificate of amendment to the Articles of Incorporation of the Citizens Gas Company which was duly and legally adopted by the voting stockholders of said company in accordance with law and that the same became and was effective from the date of the filing thereof, August 27, 1921, and that the amendments therein set forth were duly and legally adopted and constitute valid amendments to the original Articles of Association of the Citizens Gas Company set out in Subdivision Seven of plaintiff's bill of complaint.

For answer to the averments contained in Subdivision XI-A of plaintiff's bill of complaint, these defendants deny that the statutes under which the defendant, Citizens Gas Company, was incorporated, and in force when the amendments to its Articles of Incorporation were made in 1921, contained no sanction or authority for any of the provisions contained in said original Articles or in the amendments thereto in 1921, relating to the payment of certificate holders or the transfer or conveyance of the plant and property of said company to the City of Indianapolis, and deny that all such provisions, and particularly Articles IX,

X, and XII, both in their original and amended form, were and are mere surplusage and null and void and of no effect.

These answering defendants allege that it was at the time of the organization of said company and always since has been the law in Indiana that Articles of Incorporation could contain valid and binding agreements although such agreements were not included in the facts required by law to be stated in the Articles of Incorporation, provided such agreements are not inconsistent with any of the provisions of law. These defendants further allege that the provisions contained in said Articles of Incorporation respecting the payment of certificate holders and the acquisition by the City of Indianapolis of the plant and property of said Gas Company were to evidence the creation of a public charitable trust, all as hereinafter in Subdivision 15 of his answer more particularly alleged, and that the insertion thereof in said Articles of Incorporation and the amendment thereto was legalized by the Act of 1929 hereinafter more particularly referred to.

These defendants deny that the Voting Trustees of said Gas Company were wholly without authority to execute the purported Certificate of Amendment to the Articles of Incorporation of said company or to cause the same to be adopted or filed on behalf of the defendant company, and deny that they had no authority or right under any terms of said Voting Trust or of the original Articles of Incorporation to vote the stock of the company or to take any other steps which would extend, increase or otherwise modify their powers as Voting Trustees or to make any new or amended agreement affecting the rights or the property of said company or its stockholders, and deny that for such reason said purported amendments to said Articles were and are invalid, void and of no effect; and the defendants alleged that said Voting Trustees had full power and authority under the provisions of said Voting Trust as embodied in the Articles of Association of said company and as referred to in the certificates issued representing the stock of said company and the beneficial interest in said stock to vote all the stock of said company and to do all other things as stockholders which it might be found wise or expedient in their judgment to do for the best interests of said company not inconsistent with the objects, provisions and purposes of said trust as embodied in the Articles of Association of said Company; and these defendants allege that all of the amendments so made in

said Articles of Association were consistent with such objects, provisions and purposes and the action of said Voting Trustees in voting said stock for the adoption of such amendments was consistent with and within the power so granted to them.

These defendants further allege that each and every holder and owner of trustees' certificates of beneficial ownership in the first million dollars of capital stock issued by the Gas Company agreed, in the manner alleged in subdivision 15 hereof, by the execution of the subscription agreement and the acceptance of the trustees' certificates as therein alleged, to the inclusion in said articles of incorporation of said provisions, and each and every holder of trustees' certificates of beneficial ownership in the second million dollars of said capital stock, by buying pursuant to the published notice referred to in subdivision 15 hereof, and by accepting the trustees' certificates referred to in subdivision 15 hereof ratified and agreed to the inclusion of said provisions in said articles of incorporation and these defendants say that by reason of the foregoing facts, neither these plaintiffs nor any others similarly situated, can now object to the said agreement contained in said articles of incorporation nor question the validity of such provisions in said articles or in the amendments thereto.

9. These answering defendants admit the averments contained in Subdivision Twelve of plaintiff's bill of complaint that the defendant Citizens Gas Company now has outstanding first mortgage bonds in the total amount of Three Million Four Hundred and Four Thousand Dollars (\$3,404,000), bearing interest at the rate of five per cent. per annum; has outstanding preferred stock of the face value of One Million Dollars (\$1,000,000) entitled to cumulative dividends at the rate of five per cent. per annum and has outstanding common stock in the face amount of Two Million Dollars (\$2,000,000), but allege that all of said common stock is held by the defendants, Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, and Henry Kahn as voting trustees of said common stock pursuant to the Articles of Incorporation and the amendments thereto of said Citizens Gas Company, and as provided by law; these answering defendants further allege that beneficial certificates have been issued by said voting trustees representing the interest of the holders thereof in the common stock of the company, but allege that the holders of such beneficial certificates are entitled to dividends thereon, payable out of earnings at the rate of ten per cent.

per annum, payable semi-annually, only so long as the face value of such benefit certificates, viz: \$25 each remains unpaid and that if and as any partial payment is made thereon future dividends are to be paid at the rate of ten per cent. per annum only upon the remaining unpaid portion of the face value of such certificates.

These answering defendants further admit that the net earnings of the defendant Citizens Gas Company of Indianapolis from January 1st, 1929, to August 30th, 1930, together with existing earned surplus, will not be sufficient to redeem and retire the preferred stock of said defendant Citizens Gas Company of Indianapolis and also to pay to the holders of beneficial certificates an amount equal to the face value thereof together with interest thereon at the rate of ten per cent. per annum; these answering defendants further admit that the individual defendants who are directors and trustees of said Citizens Gas Company of Indianapolis have not at this or any previous time undertaken nor asserted that they would undertake to pay to the certificate holders the entire face value of such certificates with dividends thereon at this time.

These answering defendants deny that the City of Indianapolis knew that it could not become entitled under the terms of Section 1, Clause "G" of the franchise set out in the Sixth (6th) Subdivision of plaintiff's bill of complaint and in Article Ten (10) of the Articles of Incorporation of said company to a conveyance of the plant and property of said defendant on or before August 30th, 1930; but on the contrary allege that, properly interpreted, said subdivision of said franchise and the Articles of Incorporation of the Citizens Gas Company authorize and permit the transfer of the plant and property of the Citizens Gas Company of Indianapolis to the City of Indianapolis when the certificate holders have received either by dividends or otherwise an amount equal to the face value of such certificates together with interest thereon at the rate of ten per cent. per annum and these answering defendants further allege that it is wholly immaterial whether said payments are made by way of dividends or from any other source and that upon said payments being made to the extent of the face value of said certificates with interest at the rate of ten per cent. per annum, all interest of the certificate holders in the property and plant of the Citizens Gas Company of Indianapolis ceases and that the City of Indianapolis is thereupon entitled to receive a conveyance of such property.

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These answering defendants admit that the City of Indianapolis did proceed through its Board of Public Works to assert its right to acquire the plant and property of the defendant Citizens Gas Company of Indianapolis by adopting a certain resolution on March 20, 1929, and by serving the same upon the Citizens Gas Company of Indianapolis, its trustees and directors; but these answering defendants deny that the demand of said city set out in Subdivision Fourteen of the plaintiff's bill of complaint is predicated or based exclusively upon the provisions of Section 22 of the franchise of the Citizens Gas Company as repeated in Article Twelve (12) of the Articles of Incorporation of said company, but allege that said demand was in the form and tenor set out in the Fourteenth Subdivision of plaintiff's bill of complaint and that in such demand the defendant City of Indianapolis, asserted its right to said property not only under the franchise, the Articles of Incorporation and the amendments thereto, the certificates issued to the subscribers of the common stock of the Citizens Gas Company, but under all statutes and laws of this State.

10. These answering defendants admit the averment contained in Subdivision Thirteen of the plaintiff's bill of complaint as to the enactment by the 76th General Assembly of the State of Indiana of a bill, the title of which is correctly set forth in said Subdivision of plaintiff's bill of complaint. These answering defendants deny that said Act was directed solely at the Articles of Incorporation of the defendant Citizens Gas Company of Indianapolis, but on the contrary allege that said law is a general law applicable to all companies covered by the terms of said Act. These answering defendants admit that said bill contained an emergency clause and that it did become a law on the 11th day of March, 1929.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid: that the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it legally could and did legalize such provisions by said Act of 1929.

These answering defendants admit that said bill was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of

bringing about a 'transfer of the plant and property of the defendant Citizens Gas Company of Indianapolis to the City of Indianapolis; that said bill was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind or character, and that it was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County; but while admitting said averments of Subdivision Thirteen of plaintiff's bill of complaint last above referred to, these answering defendants say that said averments are wholly immaterial and without any legal effect whatever.

11. These answering defendants admit that on the 3rd day of April, 1929, the directors of defendant, Citizens Gas Company of Indianapolis, in meeting assembled, adopted two resolutions designated in Subdivision Fifteen of Plaintiff's Bill of Complaint as "Resolution No. 1" and "Resolution No. 2," and that correct copies of the said resolutions are set out in said Subdivision of plaintiff's bill of complaint; but these answering defendants deny that said action so taken by the directors of said Citizens Gas Company of Indianapolis was or is in violation of the rights of defendant, Citizens Gas Company of Indianapolis, or of plaintiff or others similarly situated in any particular whatsoever.

12. These answering defendants admit the averments contained in Subdivision Sixteen of the plaintiff's bill of complaint that the resolutions adopted by the Board of Directors of the Citizens Gas Company on April 3, 1929, as set out in Subdivision Fifteen of the plaintiff's bill of complaint were approved by the Board of Trustees of said Citizens Gas Company of Indianapolis by a resolution adopted at a meeting of said Board of Trustees on April 3, 1929, and that a correct copy of said resolution of said Board of Trustees is set out in Subdivision Sixteen of plaintiff's bill of complaint. These answering defendants deny that said action of said Board of Trustees was or is in violation of rights of the defendant Citizens Gas Company of Indianapolis or of plaintiff or others similarly situated in any particular whatsoever.

13. These answering defendants admit the averments contained in Subdivision Eighteen of the plaintiff's bill of complaint to the effect that on the 27th day of April, 1929, the plaintiff served upon the defendants, constituting the Board of Directors of the Citizens Gas Company of In-

dianapolis, a written demand, a correct copy of which is set out in said Subdivision of plaintiff's bill of complaint and admit that any further demand upon the body of the common stockholders of the defendant company would have been futile and unavailing and admit that said demand so made on the Board of Directors by plaintiff was denied and admit that said Board of Trustees claims the exclusive right to vote all the common stock of the Citizens Gas Company of Indianapolis, including the right to elect the Board of Directors thereof, but deny that said Board of Directors or said Board of Trustees of the Citizens Gas Company of Indianapolis has refused to act for the protection of the stockholders but on the contrary allege that both said Board of Directors and said Board of Trustees have at all times acted in accordance with the legal rights of said holders of beneficial certificates, although said answering defendants admit the refusal to comply with the demand of plaintiff.

14. That with respect to the averments contained in Subdivisions nineteen to thirty-three both inclusive of plaintiff's bill of complaint, these answering defendants say:

(a) These answering defendants deny that the franchise contract a correct copy of which is set out in Subdivision Six of the plaintiff's bill of complaint, was in all respects rescinded, abrogated and annulled and a new agreement substituted therefor by the act of the Citizens Gas Company of Indianapolis in taking the action set out in Subdivision Ten of plaintiff's bill of complaint; deny that the effect of said action was the creation of a wholly new contract between the State and the Citizens Gas Company of Indianapolis and deny that one of the terms of said alleged contract was that the defendant City of Indianapolis should have the right to acquire the property of the defendant company under terms and conditions and at its then value as determined and prescribed by the Public Service Commission of Indiana; deny that the Citizens Gas Company of Indianapolis relinquished all of the rights and remedies secured to it by its contract with the City of Indianapolis and thereafter possessed only such rights and remedies as were granted to it under the Shively-Spencer Utility Act; deny that the Articles of Incorporation of the defendant company and the amendments thereto were by implication or otherwise modified by the Shively-Spencer Utility Act, and deny that there is any inconsistency between said Articles of Incorporation

and the Shively-Spencer Utility Act; deny that Articles 10 and 12 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis were abrogated, rescinded or superceded by the acceptance by said company of said indeterminate permit; deny that the passage by the General Assembly of Indiana of the Legalizing Act of 1929, impaired the obligations of any contract between the State and the defendant company in violation of Article I, Section 10 of the Constitution of the United States and in violation of Article I, Section 24 of the Constitution of Indiana; deny that said Legalizing Act of 1929 is void and of no effect; deny that said Legalizing Act impairs the obligation of any contract between the State of Indiana and the Citizens Gas Company of Indianapolis; deny that by virtue of the surrender of said franchise and the acceptance of said indeterminate permit any contract exists or ever has existed between the defendant Citizens Gas Company of Indianapolis and the State of Indiana so far as said public charitable trust is concerned, but on the contrary allege that a public charitable trust was created in the plant and property of the Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of the City of Indianapolis, all as more particularly alleged in Subdivision 15 of this answer; and allege that no act of the Citizens Gas Company of Indianapolis or of the City could in any way alter, modify or impair said public charitable trust, or deprive the beneficiaries thereof, viz: the inhabitants and/or gas consumers of Indianapolis, of their interest in said property constituting such public charitable trust.

(b) These answering defendants admit that there are correctly set forth in Subdivision Twenty of plaintiff's bill of complaint, portions of certain statutes of the State of Indiana; deny that the Legalizing Act of 1929 denies to the Citizens Gas Company of Indianapolis, defendant hereto, the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States or that it is a special law directed at and applicable to the defendant Citizens Gas Company of Indianapolis alone, but on the contrary allege that said Legalizing Act of 1929 is a valid law and that the classification therein contained is general and proper. They further deny that the classification made by said Act of 1929 is unreasonable, irrational or arbitrary in any of the particulars set forth in said Subdivision of plaintiff's complaint, or in any other particular.

These answering defendants refer to Subdivision 16 of this answer in which is set forth the bases upon which the Legalizing Act of 1929 can properly be sustained, and in which facts are stated showing that the plaintiff's interests are not adversely affected by said act.

(c) These answering defendants deny that said Legalizing Act of 1929 deprives the defendant Citizens Gas Company of Indianapolis of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in any of the particulars set forth in Subdivision Twenty-one of plaintiff's complaint or in any other particular; deny that the acceptance of an indeterminate permit by the Citizens Gas Company of Indianapolis resulted in the abrogation of the franchise and articles of incorporation of the defendant company, or that thereby the defendant City of Indianapolis could only acquire the plant and property of the Citizens Gas Company at its then value through an application to the Public Service Commission of the State of Indiana. And reference is hereby made to Subdivision 17 of this answer in which these answering defendants allege the effect of the acceptance of said indeterminate permit.

(d) These answering defendants deny that said Legalizing Act of 1929 in any respect violates Article 1 of Section 21 of the Constitution of Indiana in any of the particulars set out in Subdivision Twenty-two of the plaintiff's bill of complaint or in any other particular; deny that the result of accepting said indeterminate permit under the Shively-Spencer Utility Act was that the City of Indianapolis could only acquire the plant and property of the defendant company at a price equal to its then value as fixed by the Public Service Commission of Indiana; deny that said Legalizing Act takes private property without just compensation in any of the particulars alleged in said Subdivision Twenty-two of the plaintiff's complaint or in any other particular; and deny that the original franchise contract, the Articles of Incorporation and the amendments thereto of the Citizens Gas Company were abrogated by the acceptance of said indeterminate permit in whole or in part so far as the right of the City of Indianapolis to acquire the property of the Citizens Gas Company was concerned.

(e) That with respect to the averments contained in Subdivision Twenty-three of the plaintiff's bill of complaint to the effect that the plaintiff and numerous other persons subsequent to the issuance of said indeterminate

permit in 1921 and prior to the passage of said Legalizing Act of 1929, purchased, acquired and still hold and own said certificates of beneficial ownership in the common stock of Citizens Gas Company having paid therefor amounts far in excess of what their value would have been if said City had possessed the right thereafter to acquire the company's property in a manner now asserted by said City, these answering defendants neither admit nor deny said averments but leave plaintiff to his proof thereof, but aver that during all of said time the City of Indianapolis did have the right to acquire the property of the Citizens Gas Company in the manner and for the considerations now asserted by said City of Indianapolis. These answering defendants deny that said Legalizing Act of 1929 deprives the certificate holders, including plaintiff, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States or takes private property without just compensation in violation of Article 1, Section 21 of the Constitution of the State of Indiana, or grants to certain citizens or classes of citizens, namely, the defendant City of Indianapolis, privileges or immunities which upon the same terms do not equally belong to all citizens, in violation of Article I, Section 23 of the Constitution of the State of Indiana, but on the contrary allege that said Legalizing Act of 1929 is not invalid because of any of the provisions of the Constitution of Indiana or the Constitution of the United States.

(f) These answering defendants deny that the Legalizing Act of 1929 deals with three separate and unrelated subjects in violation of Article 4 Section 19 of the Constitution of the State of Indiana, and deny that said Legalizing Act is void, but on the contrary allege that it deals with a single subject and matters properly connected therewith.

(g) These answering defendants deny that by reason of the facts alleged in Paragraph 20 of the plaintiff's bill of complaint, which are made by reference a part of Paragraph 25 thereof, that said Legalizing Act of 1929 grants to certain citizens or classes of citizens, viz., the defendant City of Indianapolis, privileges or immunities which upon the same terms do not equally belong to all citizens or that said Legalizing Act of 1929 constitutes special legislation, aimed solely at defendant Citizens Gas Company of Indianapolis, in violation of Article 1, Section 23 of the Constitution of the State of Indiana; deny that said Le-

galizing Act creates a corporation, not a banking corporation, by special act in violation of the Indiana Constitution.

(h) These answering defendants deny the averments contained in Subdivision Twenty-six of the plaintiff's bill of complaint that the provisions in Section 1, Clause (g) of the franchise contract of August 30, 1905, and also contained and incorporated in Article 10 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis to the general effect that the gas plant and property of said company shall be conveyed to said City when said certificate holders shall have received by dividends or otherwise the face value thereof with interest thereon at the rate of ten per cent. per annum, purports to create or does create an interest in real and personal property to vest upon a contingency which might occur at a time more remote from the date of the creation of such right than the period of a life or lives in being and twenty-one years thereafter; deny that such provisions were or are in violation of the common law of the State of Indiana, and deny that said provisions now are or ever were illegal, null, void or unenforceable by the defendant City of Indianapolis, but on the contrary aver that said provisions are valid and do not offend against the common law of Indiana or any statute of this state.

(i) These answering defendants deny the averments contained in Subdivision Twenty-seven of the plaintiff's bill of complaint that the option (if such provision should be construed as an option) or right of the defendant City of Indianapolis to demand the conveyance of the property of the Citizens Gas Company of Indianapolis under the provisions of the franchise contract of August 30, 1905, and the provisions of Article 12 of the Articles of Incorporation, is in violation of the common law of Indiana or that such provision is or ever has been illegal, null, void or unenforceable by the defendant City of Indianapolis for the reason that its terms might be exercised at a time more remote from the date of the creation of such option and right than the period of a life or lives in being and twenty-one years thereafter, but on the contrary allege that the right so granted and given to the City of Indianapolis is and always has been valid and enforceable under the statutes and law of this State.

(j) These answering defendants deny the averments contained in Subdivision Twenty-eight of the plaintiff's bill of complaint that the right of the City of Indianapolis

to acquire the property of the Citizens Gas Company of Indianapolis expired on the 27th day of August, 1921, when the Citizens Gas Company of Indianapolis accepted an indeterminate permit under the terms and provisions of the Shively-Spencer Utility Act, and further deny that said franchise, insofar as it evidenced the right of the City to acquire said plant and property, was in any way affected by the acceptance of said indeterminate permit; but on the contrary allege that the public charitable trust created in the property of the Citizens Gas Company as hereinafter in Subdivision 15 of this answer set forth, was wholly unaffected by the acceptance of said indeterminate permit.

These answering defendants admit that the City of Indianapolis did not attempt to exercise the right which it had to acquire the property and plant of the Citizens Gas Company of Indianapolis prior to March 20, 1929, but deny that the rights of the City had at that time expired and deny that the City's right to acquire the property of said Citizens Gas Company of Indianapolis terminated on the 27th day of August, 1921, but allege that such right has not now terminated but on the contrary exists.

(k) These answering defendants deny the averments contained in Subdivision Twenty-nine of the plaintiff's bill of complaint that under Sections 100, 101, 102, 105 and 106 of said Shively-Spencer Utility Commission Act the defendant City of Indianapolis is without power to purchase or acquire a public utility except according to the terms and conditions fixed by the Public Service Commission of Indiana; but on the contrary allege that the City of Indianapolis has the right to acquire the property and plant of the Citizens Gas Company under the terms of said public charitable trust, and by virtue, among other things, of said Legalizing Act of 1929.

These answering defendants admit that the defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Act in making its demand upon the Citizens Gas Company of Indianapolis, and admit that the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of the plant and property of defendant Company nor determined the value of said plant and property, nor fixed the terms and conditions of such acquisition, and allege that under the law of Indiana as applicable to the property and plant of the Citizens Gas Company, the Public Service Commission of Indiana has no jurisdiction

whatever to determine whether such a conveyance will be made, the price to be paid or to annex any conditions whatever to such transfer, but is wholly without jurisdiction in the premises.

These answering defendants further deny that the demand of the defendant City upon the officials of defendant Citizens Gas Company of Indianapolis was ultra vires and void, but on the contrary allege that it was a valid and legal demand.

(l) These answering defendants admit that the question of the acquisition of the plant and property of the Citizens Gas Company of Indianapolis by the City of Indianapolis has never been submitted to a popular vote of the electors of said City under the terms of Sections 93 and 249 of an Act entitled "An Act Concerning Municipal Corporations," approved March 6, 1905. These defendants admit that said Sections are now in force, but allege that they have no application whatever to the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company of Indianapolis.

These defendants say that under the terms of Section 53 of the aforesaid Act of 1905 the Common Council of said City had power by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

These answering defendants deny that the attempt on the part of the defendant City to acquire said plant and property is therefore ultra vires and void.

(m) These answering defendants admit the averments contained in Subdivision Thirty-one of plaintiff's bill of complaint that the directors of the defendant Company have caused the resolutions referred to in plaintiff's bill of complaint to be printed and mailed to all holders of certificates evidencing ownership of beneficial interest in the common capital stock of the Company, including plaintiff, and that said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere, and that said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant Company to the City in accordance with the notice and demands set out in plaintiff's bill of complaint, but deny that the only method by which said property may lawfully

be transferred from the defendant Company to the defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act. These answering defendants further admit that said directors and trustees will carry out said expressed intention and will pay said capital dividend and will convey said plant and property of the defendant Company pursuant to said demand by the defendant City unless finally enjoined and restrained from such action.

(n) These answering defendants deny the averments contained in Subdivision Thirty-two of plaintiff's bill of complaint that the franchise and articles of incorporation and amendments thereto and the acts, proceedings and threatened acts and proceedings of the defendants City of Indianapolis, Citizens Gas Company of Indianapolis and the other defendants herein create a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property, impair the value thereof, render the sale of said property at an adequate price impossible and impair the value of the certificates of beneficial interest held therein by plaintiff and all others in a similar situation, but on the contrary allege that the plaintiff and all others similarly situated acquired and hold such certificates subject to all the terms and provisions set out in Subdivision 2 and 15 of this answer. These defendants deny that plaintiff or any others similarly situated hold any stock certificates or interest therein which were impaired as alleged in said subdivision of plaintiff's bill of complaint.

(o) These answering defendants deny that the aforesaid notice and demand of the defendant City of Indianapolis and the acquiescence therein of the individual defendants constituting the Board of Directors and Board of Trustees of the defendant Citizens Gas Company of Indianapolis will, if carried into effect, compel defendant Company to convey its property at a tremendous loss, although admitting that if said public charitable trust is carried out the City of Indianapolis has the right to acquire the property of defendant Citizens Gas Company of Indianapolis after the certificate holders have been paid the par value of their certificates with interest at the rate of ten per cent. per annum and the preferred stock of the Company has been retired. These answering defendants admit that the plaintiff and others in like situation will receive no more than \$25.00 per share and interest at the rate of ten per cent. per annum in full satisfaction of all

their rights as holders of certificates of beneficial interest in the common stock of defendant Company, and allege that they are not entitled to receive any more, but admit that if said public charitable trust could be declared invalid and the holders of the beneficial certificates could become entitled to the entire equity in said property after the payment of defendant Gas Company's preferred stock and other indebtedness, and the right of the City to acquire said plant and property could be defeated, that said certificates of beneficial interest would be worth a sum in excess of \$25.00 per share, and that the value thereof would, under such circumstances, be uncertain and can not now be definitely ascertained, but these answering defendants deny that by reason of any of the facts stated in the bill of complaint the action of the defendant City of Indianapolis and other defendants hereto has caused or is causing great and irreparable injury and damage to the defendant Citizens Gas Company of Indianapolis, and the plaintiff and all others in a similar situation, or is causing any damage whatever to any of said parties.

15. These answering defendants allege that a public charitable trust was created and exists in the plant and property of defendant Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of said City of Indianapolis, which trust was to be administered by the defendant Citizens Gas Company of Indianapolis and by the defendant City of Indianapolis as respective trustees thereof, in accordance with the terms of said trust, as hereinafter in this subdivision of this answer alleged.

That the facts in connection with the establishment of said public charitable trust were and are as follows:

That in the year 1887, the City of Indianapolis by an ordinance granted to the Consumers Gas Trust Company a franchise to furnish natural gas to the citizens of said City and vicinity upon the terms and conditions specified in said ordinance; that the supply of natural gas failed some time prior to 1904 and that an attempt was made by said Consumers Gas Trust Company to engage in the business of furnishing artificial gas to the citizens of Indianapolis; that as a result of this effort, litigation ensued in the District Court of the United States for the District of Indiana and the United States Court of Appeals for the Seventh Circuit wherein it was held and finally adjudged as follows:

First. That the certificate holders of the Consumers

Gas Trust Company of Indianapolis had the right to enjoin that company from engaging in the business of supplying artificial gas to the citizens of Indianapolis on the theory that such business was ultra vires the corporation.

Second. That under the franchise, Articles of Incorporation, Subscription Contracts and other relevant agreements, the City of Indianapolis had the right, by giving six months notice, to purchase the property of the Consumers Gas Trust Company at any time after the expiration of ten years from the date of the ordinance, the amount to be paid for such plant to be determined by three disinterested appraisers.

Third. That a public charitable trust existed in favor of the inhabitants and/or gas consumers of Indianapolis in the property of the Consumers Gas Trust Company to the end that gas should be furnished at cost after the holders of beneficial certificates had received by dividends or otherwise an amount equal to their subscriptions and eight per cent. interest per annum.

That as a result of such litigation the City of Indianapolis was determined to have the right to purchase the plant and property of the Consumers Gas Trust Company and did in fact exercise such right by the assignment thereof for a nominal consideration to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, being the same identical persons to whom the franchise and ordinance set out in subdivision six of the plaintiff's bill of complaint was granted, to the end that such persons should organize or cause to be organized the Citizens Gas Company of Indianapolis.

That the property formerly belonging to the Consumers Gas Trust Company was in fact purchased by the said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt and by them conveyed to the Citizens Gas Company of Indianapolis, defendant hereto; that as a result of said litigation there was a wide-spread public movement in the City of Indianapolis to the end that a Gas Company should be organized which should own the property and plant formerly owned by Consumers Gas Trust Company; that said property should be acquired through the medium of a new corporation in which the stockholders or the owners of beneficial certificates representing common stock should be entitled to receive only the re-payment of the face value of such beneficial certificates with interest thereon at the rate of ten per cent. per annum until paid and that thereafter the city on behalf of the gas consumers

of Indianapolis and the inhabitants thereof should have the right to acquire such property without the payment of any additional consideration; the plan was so formed for the purpose of avoiding that which had theretofore happened, viz: that the persons owning the beneficial certificates of stock should receive the face value of such certificates with interest and thereafter the city be compelled to purchase said plant and pay therefor a large sum of money.

That wide publicity was given by the public spirited citizens engaged in the organization of the Citizens Gas Company of Indianapolis to the plan, including publicity in all of the newspapers in the City of Indianapolis, Marion County, Indiana, and that the essential elements of the plan and of the public charitable trust to be thereby created were stated and agreed upon as follows:

First. That all of the common stock of the Citizens Gas Company of Indianapolis should be held and perpetually voted by voting trustees to be appointed as provided in Section 6 of the original Articles of Incorporation which are set forth in Subdivision Seven of the plaintiff's bill of complaint.

Second. That such Trustees should issue to each subscriber to the capital stock of the company a beneficial certificate and that the holder thereof should be entitled to repayment of the face value of the same out of dividends or otherwise with interest at the rate of ten per cent. per annum, payable semi-annually and that when the face value of such certificate had been paid the holder should have no further interest in the property and plant of the Citizens Gas Company.

Third. That when said certificate holders have been paid in full the City of Indianapolis should have the right to acquire said property for the benefit of the public and the consumers of gas in Indianapolis without the payment of any money or further consideration.

Fourth. That a public charitable trust to be administered by the Citizens Gas Company of Indianapolis and the City of Indianapolis respectively as trustees was to be and was created in the property and plant of the Citizens Gas Company of Indianapolis to the end that private exploitation thereof should be prevented and that gas should be supplied at the lowest possible cost to the citizens of Indianapolis who should desire to use the same.

It was necessary, in order to acquire the property and plant formerly belonging to the Consumers Gas Trust

Company, to interest local capital in the enterprise and for the purpose of inducing the persons who should invest in the common stock of said company to make such investment upon the condition that they should never receive any more than the face value of said certificate, it was proposed and agreed that interest thereon should be paid at the rate of ten per cent. per annum.

Fifth. Said plan contemplated that the Citizens Gas Company of Indianapolis should be the Trustee of said public charitable trust until such time as said certificate holders were repaid the face value of their certificates with interest at the rate of ten per cent. annually and that thereafter the City of Indianapolis should acquire said property for the benefit of the gas consumers and inhabitants of said city, but that it was never intended that title to the plant and property of said Citizens Gas Company should be vested and it was not in fact vested in the City of Indianapolis as an agency of the State, but solely for the benefit of the inhabitants of said city and particularly those who at that time or thereafter should desire to use the gas to be supplied by said company.

That each of the original subscribers to the common capital stock of the Citizens Gas Company with which it was to begin business, to wit: One Million Dollars par value thereof was required to and did execute subscriptions to the capital stock of the Citizens Gas Company upon the following form:

“Trustees—Thos. L. Sullivan, Thos. H. Spann, W. D. Cooper, Lucius B. Swift, Henry Kahn.

Directors—Franklin Vonnegut, Lorenz Schmidt, Jas. L. Keach, Geo. J. Marott, E. H. Elbridge, Alfred F. Potts, Jno. R. Welch, Robert Lieber, J. D. Forrest.

Subscription to Stock of
Citizens Gas Company of Indianapolis
Temporary Office, 1201 Law Building
New Phone 361

I hereby subscribe for and agree to take _____ shares (par value \$25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for same at the rate of \$25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company, as follows: 10 per cent. on demand, and 20 per cent. on the tenth day of each month thereafter (except

that the last payment shall be 30 per cent.) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent. shall have been paid on not less than \$500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1907, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company, Trustee.

I hereby agree that the stock above subscribed shall be issued to a Board of Five (5) Trustees, named in the Articles of Incorporation of said Company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the Articles of Incorporation under which said Company is formed; and that when the indebtedness of said Company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10 per cent. per annum, then the Trustees and Directors of said Company shall execute proper instruments transferring all the property of said Company, of every kind and description, to the City of Indianapolis; and that thereupon all my interest in said Company and all its property shall thereby be cancelled, released and extinguished.

Date

Name

Address

Pay No Money to Solicitors"

That the plaintiff and all other present holders of beneficial certificates representing their ownership of the first one million dollars to be issued of the common capital stock of the Citizens Gas Company acquired the same either directly or by mesne assignments from the original subscribers to said capital stock and each and all of such present holders of said beneficial certificates had full knowledge and notice at the time of such acquisition, of the terms of said subscription contract hereinbefore set out; that said subscription contracts constituted and were a part of the general plan to form said public charitable trust.

That after the organization of the Citizens Gas Com-

pany of Indianapolis the voting trustees issued to each subscriber of the common capital stock and thereafter to all purchasers of such stock a trustee's certificate in the following form:

“Capital Stock \$2,000,000.

Shares \$25.00 Each

Trustee's Certificate

Citizens Gas Company of Indianapolis

This Certifies That

..... is entitled to Shares of the par value of \$25.00 each, of the Capital Stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding Stock of said Company, have, with the consent and agreement of the aforesaid owner, been issued to a Board of Five Trustees as provided in the Articles of Incorporation of said Company and in the Gas Franchise granted to it by the City of Indianapolis, August 25th, 1905, and said Capital Stock shall be and remain under the exclusive and irrevocable control of said Board of Five Trustees and their Successors, with full, complete, exclusive and irrevocable power in said Board of Trustees to hold said Stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the Articles of Incorporation of said Company mentioned, set forth and described. The aforesaid holders of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the Directors thereof; and when said certificate-holder shall have received, by dividends or otherwise, upon said certificate an amount equal to the face value thereof together with interest thereon at the rate of ten per centum per annum payable semi-annually then this Certificate shall be deemed fully paid and cancelled and the interest of said holder in said Company and its assets shall thereupon cease and the property of said Company shall be disposed of as provided in said Articles of Incorporation. This Certificate is transferable only on the books of the Company by holder thereof in person or by attorney on surrender of this Certificate properly endorsed.

In Witness Whereof, this Certificate is signed by the President of the Board of Trustees, attested by the Presi-

dent and Secretary of the Board of Directors, and sealed with the seal of said Company this _____ day of _____ A. D. 19_____.

Presiden' Board of Trustees.

Attest:

President Board of Directors

Secretary Board of Directors

For value received _____ hereby sell, assign, and transfer unto _____ Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint _____ Attorney to transfer said stock on the books of the within named Company with full power of substitution in the premises.

Dated _____ 19_____

In presence of _____

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever."

That on the 25th of March, 1911, pursuant to the provisions of Article 4 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis, as set out in subdivision Seven of the plaintiff's bill of complaint, the common capital stock of said Company was encreased from One Million Dollars to Two Million Dollars, and thereafter, from time to time, prior to July 1, 1919, said additional One Million Dollars of common capital stock was sold at public auction to the highest bidder therefor after giving thirty (30) days notice of the time and place of such sale by publication in three Indianapolis newspapers having the largest city circulation, all as provided in said Article 4 of said original Articles of Incorporation.

That in said published notices of the offering of said additional common stock for sale at public sale, it was specifically stated that all stock sold should be issued in all respects conformably to the terms and conditions of the Articles of Incorporation and franchise of the Citizens Gas Company relating thereto.

That all of said additional One Million Dollars of common stock was sold, pursuant to such notices of sale, and Trustees' certificates representing the beneficial ownership of said additional One Million Dollars of common stock were issued to the purchasers at such public sales, or their nominees, in the form of the certificate hereinabove set out, and no other form of certificate or other evidence of ownership was ever issued to any such purchasers or the nominees of any such purchasers.

That all subsequent owners of any of said second Million Dollars of common stock, upon acquisition thereof from prior owners thereof, received, and the present owners thereof now hold, Trustees' certificate of beneficial ownership in the form hereinabove set out, and there has never been issued or authorized any other form of certificate representing any part of the Two Million Dollars authorized common capital stock of the company other than the Trustees' certificates of beneficial ownership in the form hereinabove set out.

That the plaintiff and each and every present or former holder of Trustees' certificates has received, accepted and held such Trustees' certificates containing the specific agreements hereinbefore set forth and has never at any time had any other evidence of his ownership of the beneficial interest in the Citizens Gas Company and that the plaintiff and all the other holders of beneficial certificate of the Citizens Gas Company of Indianapolis defendant hereto are bound by each and all of the terms and conditions of the foregoing subscription contract and beneficial certificates as well as by the provisions of the franchise contract the Articles of Association the amendments thereto and the public charitable trust created at the time of the organization of the Citizens Gas Company of Indianapolis, defendant hereto, as in this paragraph of answer specifically alleged.

That neither the plaintiff nor any other present holder of such beneficial certificates has ever objected or protested against the form of such beneficial certificates or the covenants or agreements therein contained or in any way at any time evidenced his unwillingness to be bound thereby until within the last few months when publicity was given to the plan of the City of Indianapolis to acquire the plant and property of the Citizens Gas Company; that at no time either before or after such mentioned publicity has the plaintiff or any other holder of beneficial certificates of the Citizens Gas Company of Indianapolis surren-

dered or offered to surrender the same or asked or demanded the issuance to him or them of certificates representing his or their beneficial ownership free from the conditions above set forth.

16. These answering defendants say that said Legalizing Act of 1929 is valid in all respects. Said Act only legalizes a contract voluntarily made by said corporation with the State in its articles of incorporation and in the amendments thereof and enables said City to take said property in accordance therewith. Said Act does not attempt to revive any obligation abrogated by the surrender of said franchise, but only places the express stamp of approval by the State on a contract made by said corporation and which survived the surrender of said franchise.

Said act does not deprive plaintiff of the equal protection of the law by providing for an invalid classification. The classification to which it applies is a self-created class consisting of corporations who voluntarily placed in their articles of incorporation provision for the transfer of their properties prior to the time when the new rules in said Shively-Spencer Act governing such transfers came into effect, on to-wit, May 1, 1913. Said Act does not impose on said class any obligations, but merely approves self-imposed obligations contained in articles of incorporation. Said corporation is not complaining of said Act, but is voluntarily performing its obligations which said Act approves. Plaintiff cannot complain of said Act for the reason that he, through said board of trustees having power to vote all stock, has given his consent to the performance of said obligation, and further because he is not injuriously affected by said Act in that he took his rights subject to the obligations which said Act approves.

Plaintiff cannot complain on the ground that said Act should also, to be valid, have approved similar provisions appearing only in franchises held by corporations for the reason that he is not injured by such exclusion. Only an excluded corporation could complain on that ground if any such ground of complaint exists.

Said defendants say that said Act is not invalid in that it provides a method for effecting the acquisition of the instant property different from the methods provided for in said Shively-Spencer Act, or the Act of 1905 mentioned in plaintiff's complaint. Said Acts do not apply to cases, as the instant one, where a corporation owns its property subject to a trust and an obligation to transfer its property in accordance with an agreement contained in

its articles of incorporation. The Act of 1929 directly approves provisions for the transfer of property subject to trusts and obligations voluntarily created by the corporations included in the class to which the Act applies. Plaintiff is not injuriously affected by said Act on account of approval thereof by the legislature of the transfer in question without the submission thereof to a vote or to the Public Service Commission. By such direct approval said Act only provides for the transfer which said corporation voluntarily agreed to, and which the plaintiff and all other holders of certificates of beneficial interests in said stock agreed to by accepting his and their certificates wherein said conditions for surrender of said stock and the transfer of said property were incorporated. If said provisions for transfer of said property are not as advantageous to plaintiff as transfers under the provisions of other statutes, in the absence of such contract, might be, such disadvantage is not created by said Act of 1929, but is a disadvantage voluntarily created by said corporation when it agreed to make such transfer and voluntarily acquiesced in by plaintiff when he purchased said certificates subject to such obligation to transfer, and said Act cannot be invalid as to plaintiff in such situation.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid. That the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it could and did legalize such provisions by said Act of 1929.

Said defendants say that said Act of 1929 is not duplicious. The subject on which it legislates is the transfer of utility properties under agreements to transfer expressed in articles of incorporation.

The provisions approving and legalizing such agreements and those enabling cities to take under such agreements are matters properly connected with said subject and are in aid of the main object of said Act to give effect to such agreements to transfer. Said Act of 1929 is in all respects valid.

17. These answering defendants allege and say that the City of Indianapolis now has all of the rights in and to the property of the Citizens Gas Company of Indianapolis as claimed by it in the resolution set out in Subdivision Fourteen of plaintiff's complaint, and as recognized in the

several resolutions of the board of directors and the board of trustees of said corporation set out in Subdivisions Fifteen and Sixteen of said complaint; that the surrender of said franchise did not, and legally could not, take said rights from said city, or impair in any manner the aforesaid trust or the rights, interests and obligations thereunder. As to the effect of this surrender of said franchise upon the said rights of said city, these defendants allege more particularly as follows:

(a) That it was the desire of the public spirited citizens of Indianapolis who promoted the formation of said public charitable trust, as set forth in Subdivision 15 of this answer, of the City of Indianapolis and of said Citizens Gas Company that said public charitable trust and the terms and conditions thereof should, for the protection of all concerned, be evidence in every possible way. In order to accomplish such purpose, the dominant terms and conditions of said trust were placed in the franchise contract itself, in the Articles of Incorporation of the Citizens Gas Company and the amendments thereto, in the subscription contracts and in the beneficial certificates issued by the trustees of the Citizens Gas Company. These answering defendants allege that the agreement so arrived at was not intended to be merely a part of the franchise contract or of the Articles of Incorporation, or of the subscription contracts, or of the Trustees' Certificates, but was stated in each and all of said papers and writings for the purpose aforesaid and in order to evidence the public charitable trust which had been created and which was to continue to exist and which trust could not be abrogated by the surrender of said franchise.

(b) Any provisions contained in the ordinance granting said franchise which provide for the retirement and cancellation of the common stock and the conveyance of such property to the city, were not abrogated by the surrender of the municipal franchise to the state, but the surrender of such franchise only had the effect herein alleged in sub-paragraph (c) (2) hereof, and all such provisions relating to the retirement of such stock and the conveyance of such property continued and remained in full force and effect after the surrender of such franchise and are still in full force and effect.

The voting trustees of the defendant Citizens Gas Company, at a meeting thereof held on the 11th day of August, 1921, adopted a formal resolution authorizing the surrender of said franchise and at the same meeting of

said voting trustees a formal resolution was adopted authorizing the amendments to the Articles of Association of said Gas Company which are particularly set forth in Subdivision Eleven of the bill of complaint herein; that by such action of said voting trustees taken at such meeting in authorizing the surrender of said franchise and the amendment of its Articles of Association the purpose of said trustees was plainly evidence and expressed to preserve and protect all rights of the City of Indianapolis and the inhabitants thereof in and to the property of the Citizens Gas Company.

These defendants further say that under the provisions of Section 53 of the Act of the General Assembly of the State of Indiana, entitled, "An Act Concerning Municipal Corporations," approved March 6th, 1905, said City was authorized and empowered by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and by the ordinance set out in Subdivision Six of plaintiff's bill of complaint the Common Council of said City did receive and accept the public trust created in the manner set out in Subdivision Fifteen of this answer and as provided in the Articles of Association of the Citizens Gas Company, and did agree to the conditions and terms therein provided, and the surrender of said municipal franchise by said company did not abrogate or affect the public trust so accepted and agreed to; and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

(e) Even though it be held that the surrender of said franchise operated to abrogate all the terms and provisions embodied therein, such fact would not impair the rights of said city in and to the property of said Gas Company for the following reasons:

(1) The rights of said city in and to said property were never in favor of the state or of said city as the agent of the state and were in no sense subject to any power reserved in the State of Indiana by virtue of which it could make a legally effective offer to said corporation to abrogate the same.

(2) The only offer made by the state to said corporation in said Shively-Spencer Utility Commission Act was the offer to abrogate the franchise contract entered into by it, through said city as its agent, and said corporation, and to substitute therefor a new contract directly between

itself and said corporation. The effect of such offer was to establish new contractual and regulatory relations between the state itself and said corporation, and, to that end, to substitute for the permit granted by the city, as such agent, an indeterminate permit direct from the state, and to substitute direct regulations as to rates and service by means of state legislation to be administered by the Public Service Commission for regulation by the agency of the City of Indianapolis as embodied in such franchise contract. Such offer did not include the abrogation of obligations owing by said corporation to any one other than the state or to said city in its capacity as an agent of the state. Said offer did not include a proposition to surrender the corporate franchise of said corporation, or to abrogate the contract between the said corporation and the state which existed between them by virtue of the articles of incorporation of said company, or to abrogate said trust which was created as aforesaid, or to abrogate the obligations of said corporation to said city in its capacity as the beneficiary or prospective trustee of said trust, or to abrogate the rights and interests of the inhabitants of said city as beneficiaries of said trust, or as beneficiaries of the right to have said city acquire said property in accordance with said provisions for the acquisition of said property for their benefit. Said corporation could not, and did not, by surrendering said franchise, abrogate more than said offer included, and such surrender in no manner affected matters which were not a part of, or dependent upon, said franchise.

(3) Said rights of said city in its said capacity as the prospective owner and/or trustee of said property, and the obligation of said corporation to transfer said property to said city, and said trust, and said rights and interests of the inhabitants of said city were not dependent alone upon the franchise which said corporation surrendered. Said franchise and the exercise of any rights thereunder were themselves dependent upon the prior creation of said obligations, rights, trusts and interests aforesaid. Notwithstanding the fact that the provisions for the acquisition of said property by said city were included in the original instrument by which said city granted said franchise, the said provisions and the obligations and rights thereby created were at no time solely dependent upon said franchise or on the terms and provisions constituting the contract or franchise. The facts hereinabove alleged relating to the circumstances existing prior to,

and at the time of the granting of said franchise, together with said original instrument show that said provisions were included in the same instrument which evidences the contract of franchise, in part for the purpose of providing what should be incorporated in the articles of association of said company when it should be thereafter incorporated and it appears therefrom that a further and permanent agreement embodying said provisions should be the articles of incorporation of the corporation to be formed by the grantees of said franchise. The form of such permanent agreement was embraced in said original instrument, and the same was intended to be incorporated in said articles *in hac verba*. Such permanent agreement was intended to become a part of the corporate franchise thereafter to be granted by the state to the proposed corporation, made by the articles of incorporation between such corporation and the state, and, as there evidenced, was to be effective for the benefit of said city and its inhabitants. The provisions for the formation of said corporation and the inclusion of said permanent agreement for the acquisition of said property by said city in its articles constituted part of the consideration for the granting of said franchise by said city to said grantee and constituted conditions precedent to the exercise of any rights by said corporation under the said franchise to be assigned to it. The said circumstantial facts and said original instruments show that it was intended upon the organization of said corporation and the adoption of its articles of incorporation thereby to create vested rights and interests on the part of said city and the inhabitants thereof in and to the property of which the corporation might become the owner and that said corporation should own such property subject to said rights and interests and the obligation to transfer its property to said city in accordance therewith.

(4) In conformity with the aforesaid intention of the parties to said original instrument, and in performance of said conditions precedent, the persons to whom said franchise was granted formed the contemplated corporation, the said Citizens Gas Company, defendant herein, and incorporated in its articles the said provisions for the acquisition of said property by said city, and assigned said franchise to said corporation. Said corporation was thus created and said provisions were thus incorporated in its articles of incorporation more than fifteen years before said corporation surrendered said franchise. Said provisions have ever since remained in, and are now a part of,

said articles of incorporation. Said articles are a part of the corporate franchise of said corporation and constitute a permanent agreement between said corporation and the State of Indiana for the benefit of said city and its inhabitants, as aforesaid. By said provisions, said Citizens Gas Company became a trustee of its property for the purposes of said provisions. All of the property acquired by it became affected by said provisions and said trust, and the inhabitants and said city acquired vested rights and interests in and to all of said property, as aforesaid, before the said surrender of said franchise, and they are now the owners of said vested rights and interests. Said provisions in said articles, and said trust and said rights and interests have at all times since said incorporation existed wholly independently from said franchise. When said franchise was surrendered the said provisions in said articles, and the corporate franchise of said corporation, and said trust and said rights and interests, were not abrogated but remained unimpaired, and are now in full force and effect. The new contract arising between said corporation and the state upon surrender of said franchise, and the indeterminate permit as part thereof, do not in any sense supersede or abrogate said corporate franchise, said articles of incorporation or the contract made thereby, or said trust or any of said rights or interests. Any rights which said corporation may have under said indeterminate permit and under said new contract are subject to its obligations under said provisions in said articles of incorporation and to said trust, and to said rights and interests on the part of said city and its inhabitants to have said property transferred to said city in accordance with said provisions in said articles. The provisions in said Shively-Spencer Act relating to the purchase of the property of a utility that has surrendered its franchise do not supersede said provisions for the transfer of its property contained in the articles of association of said corporation, and said corporation has no right by virtue thereof to a purchase price for its property determined in accordance with the provisions of said act. Said act did not intend that said corporation could abrogate the contract made by its articles of incorporation and particularly by said provisions therein hereinbefore referred to, and did not intend that said trust and said obligations, rights and interests could be abrogated by the surrender of said franchise. The right of said city to the transfer of said property and the right of the inhabitants to have it

so transferred, the obligation of said corporation to make such transfer, the said trust, and the said vested rights and interests in no degree depend for the existence on the franchise which was surrendered, but they arise out of an executed consideration and executed conditions precedent, and are efficaciously evidenced by said provisions in said articles of incorporation.

(5) The inhabitants of said city and the said city have a continuing right to the transfer of said property in accordance with said provisions. Said right was created and given by said corporation as a consideration for and condition precedent to the granting of said franchise and the exercise of any rights thereunder. The surrender by said corporation of its franchise did not in anywise surrender or abrogate the irrevocable rights of others which it had agreed to confer, and did confer, before it could receive and enjoy the thing with which it has voluntarily parted, viz.: said franchise. Said corporation could, by said surrender, abandon or exchange the rights it received, but it could not escape its obligation provided for in the independent contract and which constituted the consideration and condition precedent which were essential to the existence and enjoyment of the rights granted it by said city.

(6) If the provisions for the transfer of said property constituted no more than an offer to make such transfer, the surrender of said franchise would not have operated to withdraw the same, inasmuch as said provisions have at all times appeared in said articles of incorporation and such articles were unaffected by the surrender of said franchise. Coincident with such surrender said provisions were reincorporated in articles of amendment of said articles of incorporation. Neither said corporation nor plaintiff ever did anything to withdraw or to avoid **said provisions** in said original and amended articles of incorporation before said city made demand for performance. On the contrary said corporation, by and through its board of directors, and its board of trustees having full power to represent plaintiff by virtue of the terms of said voting trust, is now carrying said provisions into effect in response to the demand made in behalf of said city, all as shown in Subdivisions Fourteen, Fifteen and Sixteen of plaintiff's complaint. Plaintiff's certificates, by virtue of which he claims the right to maintain this action, were issued and purchased by him after said franchise was surrendered, and the same

have incorporated therein the same provisions for such transfer as appear in said original and amended articles. Said provisions were in effect when plaintiff acquired said certificates, are a part of said certificates, and his rights in and to the property and assets of said corporation are subject to the rights of said city under said provisions for transfer.

(7) Said Citizens Gas Company of Indianapolis has at no time claimed, and is not now claiming, that the surrender of said franchise abrogated the right of said city to said property in accordance with said provisions. On the contrary said corporation reaffirmed said provisions in said amended articles coincident with said surrender, as aforesaid, and is now intending to perform in accordance therewith. Plaintiff is in no position to complain of said corporation's intention to transfer said property in accordance with said provisions for the reason that said provisions are a part of the contract between himself and said corporation and he took his certificate subject to said provisions, also for the reason that so far as his consent is material to performance of said provisions by the corporation such consent is being given by said board of trustees, who have full authority to give such consent for plaintiff by virtue of their power under said voting trust to vote all of the stock of said corporation on all matters affecting said corporation.

Wherefore, these answering defendants say that plaintiff's bill of complaint should, on final hearing, be dismissed for want of equity and that the plaintiff is not entitled to any relief whatever in the premises.

John W. Holtzman,

Oren S. Hack,

Edward H. Knight,

Smiley N. Chambers,

Pickens, Davidson, Gause,

Gilliom & Pickens,

Attorneys for said Answering Defendants.

John W. Holtzman,

Fred C. Gause,

Of Counsel.

1156 PLAINTIFFS' STIPULATION EXHIBIT 32.

Motion to Strike Portions of City's Answer in
Todd Case.

This motion is copied on pages 154-161, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of Todd *vs.* Citizens Gas Company of Indianapolis, *et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

• • (Caption) • •

AMENDED MOTION TO STRIKE OUT PORTIONS OF SEPARATE AND SEVERAL ANSWERS OF DEFENDANTS, CITY OF INDIANAPOLIS; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY, AND EMSLEY W. JOHNSON, AS AND CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFF'S BILL OF COMPLAINT.

Plaintiff, Newton Todd, for the reason that each of the hereinafter specified portions of the answer of the above-named defendants fails to state a ground of defense to plaintiff's bill of complaint, moves the court to strike out each of said portions of said answer, to-wit:

1. That portion of Subdivision 3 of said answer reading as follows:

"answering which these defendants allege that said trustees hold said stock not only in a voting trust but subject to all the terms and conditions of the trust in the property of the Citizens Gas Company, as set out in the Articles of Association of said Company, and as hereinafter set out in Subdivision 15 hereof, and except the averment that the trustees' certificates issued to the plaintiff and other holders thereof evidence the entire beneficial ownership of the shares of stock represented thereby, but on the contrary aver that the holders of said beneficial certificates acquired and hold the same subject to all of the terms and conditions heretofore set out in Subdivision 2 of this answer and hereafter set out in Subdivision 15 hereof."

2. That portion of Subdivision 4 of said answer reading as follows:

"but deny that by reason of the issuance of such certificates the plaintiff acquired the entire beneficial ownership of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis, but on the contrary allege that plaintiff at the time he acquired said certificates and continuously since such time was bound by all the terms and conditions more particularly set forth in Subdivisions 2 and 15 of this answer."

3. That portion of Subdivision 5 of said answer reading as follows:

"except they do not admit that after the surrender of the franchise of the Citizens Gas Company and the acceptance by said company of an indeterminate permit that the rights of the certificate holders or the City of Indianapolis were in any way changed or affected so far as the public charitable trust in the property of the Citizens Gas Company is concerned."

4. Those portions of Subdivision 6 of said answer reading as follows:

"but these defendants deny that such beneficial certificates represented the ownership of said shares of common stock, but only the restricted interests therein of the beneficial certificate holders, all as more particularly set out in Subdivision 15 of this answer."

and

"but allege that such stock certificates did not evidence any absolute ownership in the plaintiff of such shares of stock, but only a restricted interest therein, as more particularly hereinafter set forth."

5. That portion of Subdivision 7 of said answer reading as follows:

"but these answering defendants deny that such surrender of ~~said~~ franchise or the acceptance of said indeterminate permit in any way affected the right of the City of Indianapolis to acquire the plant and property of the defendant Gas Company or the public charitable trust created in favor of the inhabitants and gas consumers of said city and refer the court the Subdivision 17 of this answer wherein is specifically alleged the effect of the surrender of said franchise."

and also Subdivision 17 of said answer.

6. That portion of Subdivision 7 of said answer reading as follows:

"These answering defendants deny that as a result of

the certificate so filed by the defendant Citizens Gas Company of Indianapolis and of the action taken by the Public Service Commission of Indiana with respect thereto that the original contract between the City of Indianapolis and the defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled and a new contract substituted therefor, the details of which were and are prescribed in said Shively-Spencer Utility Commission Act, but on the contrary aver that the public charitable trust created in the property of the Citizens Gas Company, as hereinafter more particularly set out in Subdivision 15 of this answer was in no way affected, altered or changed by the surrender of said franchise and the taking out of said indeterminate permit."

7. That portion of Subdivision 8 of said answer reading as follows:

.

"(Here follows all but the first paragraph of subdivision 8 of the answer of the City of Indianapolis, et al. in the Todd case, a copy of which answer is in evidence as Plaintiffs' Stipulation Exhibit 31)."

(Inserted pursuant to stipulation filed November 22, 1939.)

8. That portion of Subdivision 9 of said answer reading as follows:

"but allege that the holders of such beneficial certificates are entitled to dividends thereon, payable out of earnings at the rate of ten per cent. per annum, payable semi-annually, only so long as the face value of such benefit certificates, viz: \$25 each remains unpaid and that if and as any partial payment is made thereon future dividends are to be paid at the rate of ten per cent. per annum only upon the remaining unpaid portion of the face value of such certificates."

9. That portion of Subdivision 9 of said answer reading as follows:

"but on the contrary allege that, properly interpreted, said subdivision of said franchise and the Articles of Incorporation of the Citizens Gas Company authorize and permit the transfer of the plant and property of the Citizens Gas Company of Indianapolis to the City of Indianapolis when the certificate holders have received either by dividends or otherwise an amount equal to the face value of such certificates together with interest thereon at the rate of ten per cent. per annum and these answering defendants further allege that it is wholly immaterial whether said payments

are made by way of dividends or from any other source and that upon said payments being made to the extent of the face value of said certificates with interest at the rate of ten per cent. per annum, all interest of the certificate holders in the property and plant of the Citizens Gas Company of Indianapolis ceases and that the City of Indianapolis is thereupon entitled to receive a conveyance of such property."

10. That portion of Subdivision 10 of said answer reading as follows:

"These answering defendants deny that said Act was directed solely at the Articles of Incorporation of the defendant Citizens Gas Company of Indianapolis, but on the contrary allege that said law is a general law applicable to all companies covered by the terms of said Act."

11. That portion of Subdivision 10 of said answer reading as follows:

"These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid; that the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporation of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it legally could and did legalize such provisions by said Act of 1929."

12. That portion of Subdivision 10 of said answer reading as follows:

"but while admitting said averments of Subdivision Thirteen of plaintiff's bill of complaint last above referred to, these answering defendants say that said averments are wholly immaterial and without any legal effect whatever."

13. That portion of Subdivision 12 of said answer reading as follows:

"These answering defendants deny that said action of said Board of Trustees was or is in violation of rights of the defendant Citizens Gas Company of Indianapolis or of plaintiff or others similarly situated in any particular whatsoever."

14. That portion of Subdivision 13 of said answer reading as follows:

"but deny that said Board of Directors or said Board of Trustees of the Citizens Gas Company of Indianapolis has refused to act for the protection of the stockholders, but on the contrary allege that both said Board of Directors and said Board of Trustees have at all times acted in

accordance with the legal rights of said holders of beneficial certificates, although said answering defendants admit the refusal to comply with the demand of plaintiff."

15. Subdivision 14(e) of said answer.
16. Subdivision 14(b) of said answer.
17. Subdivision 14(c) of said answer.
18. Subdivision 14(d) of said answer.
19. Subdivision 14(e) of said answer.
20. Subdivision 14(f) of said answer.
21. Subdivision 14(g) of said answer.
22. Subdivision 14(h) of said answer.
23. Subdivision 14(i) of said answer.
24. The first grammatical paragraph of Subdivision 14 (j) of said answer.

25. The first grammatical paragraph of Subdivision 14 (k) of said answer.

26. That portion of Subdivision 14(k) of said answer, reading as follows:

"and allege that under the law of Indiana as applicable to the property and plant of the Citizens Gas Company, the Public Service Commission of Indiana has no jurisdiction whatever to determine whether such a conveyance will be made, the price to be paid or to annex any conditions whatever to such transfer, but is wholly without jurisdiction in the premises.

These answering defendants further deny that the demand of the defendant City upon the officials of defendant Citizens Gas Company of Indianapolis was ultra vires and void, but on the contrary allege that it was a valid and legal demand."

27. Subdivision 14(l) of said answer.

28. That portion of Subdivision 14(m) of said answer reading as follows:

"but deny that the only method by which said property may lawfully be transferred from the defendant Company to the defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act."

29. That portion of Subdivision 14(o) of said answer reading as follows:

"and allege that they are not entitled to receive any more."

30. That portion of Subdivision 2 of said answer reading as follows:

• • • • •

("Here follows all of the first paragraph of subdivision 2 of the answer of the City of Indianapolis, et al. in the Todd

case (Plaintiffs' Stipulation Exhibit 31) except the first few lines of said paragraph, reading as follows: 'These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis')."

(Inserted pursuant to stipulation filed November 22, 1939.)

also that portion of Subdivision 14(n) of said answer reading as follows:

"but on the contrary allege that the plaintiff and all others similarly situated acquired and hold such certificates subject to all the terms and provisions set out in Subdivision 2 and 15 of this answer."

and also Subdivision 15 of said answer.

31. Subdivision 16 of said answer.

Plaintiff hereby saves and reserves to himself all of his rights in the presentation of evidence and proofs, and to a hearing upon the merits of the issues of fact and law involved in this cause. in the event it should be determined that this motion should not be sustained.

Matson, Carter, Ross & McCord,
Barnes & Johnson,

Attorneys for Plaintiff.

Frederick E. Matson,
Earl B. Barnes,
Austin V. Clifford,
Of Counsel.

1157 PLAINTIFFS' STIPULATION EXHIBIT 35.

Bill of Complaint in Williams Case.

This bill of complaint is copied on pages 110-228, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of Williams *vs.* Citizens Gas Company, et al., Plaintiffs' Exhibit 3 for Identification, which original exhibit is included in this transcript by order of the Court.

COMPLAINT.

(1)

"The plaintiffs Allen G. Williams and Harold L. Bartholomew, as inhabitants and taxpayers of the City of Indianapolis, in the State of Indiana, suing in the right and behalf, and for the use and benefit, of themselves and of all

other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiff herein, complain of Citizens Gas Company of Indianapolis, Indiana, a corporation; Indianapolis Gas Company, of Indianapolis, Indiana, pretending to be a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Crosier; City of Indianapolis, in the State of Indiana, a municipal corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis; E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Ruddell, Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis; John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh, Jere West, as the Public Service Commission of Indiana; Ferdinand Winter and Trust Company of America as Trustees, under a mortgage executed by said Indianapolis Gas Company, defendants, and say:

"That the plaintiffs Allen G. Williams and Harold L. Bartholomew, each is an inhabitant and taxpayer of the City of Indianapolis in the State of Indiana, and as such bring this suit in the right and behalf, and for the use and benefit, of themselves and of all other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiffs herein.

"That the defendants Citizens Gas Company of Indianapolis is and the Indianapolis Gas Company pretends to be, each a manufacturing and Chemical Company organized and operating pursuant of an act of the General Assembly of the State of Indiana, entitled: 'An act for the incorporation of manufacturing and mining companies and companies for mechanical, chemical and building purposes' that said act was approved on May 20, 1852, but it was not published in the sessions laws of the session at which it was enacted. It was published in the Revised Statutes of 1852, and it took effect accordingly on May 6, 1853. Notwithstanding the irregularity in its publication said act

has been accepted by the general assembly as a valid law and was reenacted and republished in the revised statutes of 1881, and the defendants Citizens Gas Company of Indianapolis was and the Indianapolis Gas Company pretends to have been, each, organized thereunder prior to the year 1913. That said act contained no reservation of any power of amendment or revision by the general assembly.

"That the defendants John R. Welch, Gustav A. Efroymsen, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette and Edgar H. Evans each is a duly incumbent member of and together they constitute the Board of Directors of said Citizens Gas Company and in that capacity each is, and they together are, made parties herein.

"That the defendants Gustav A. Schnull, Otto R. Lieber, Thomas L. Sullivan, Henry Kahn and Frank C. Dailey each is a duly incumbent member of, and together they constitute, the trustees holding in trust the legal title to all the common stock of said Citizens Gas Company, under and pursuant of the terms and conditions of a certain Public Charitable Trust contract, hereinafter described and in that capacity each is, and they together are, made parties herein.

"That the defendant John R. Welch, is president of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Clarence L. Kirk is vice-president and general manager of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Frederick G. Rastenburg is secretary of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Gustav A. Efroymsen is treasurer of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Paul E. Crosier is general superintendent of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant City of Indianapolis is a municipal corporation and a city of the first class of the State of Indiana and it is, also, the trustee of said Public Charitable Trust hereinafter described and in each of these capacities it is made a party herein.

"That the defendant Reginald H. Sullivan is the duly incumbent Mayor of said City of Indianapolis and in that capacity he is made a party herein.

"That the defendant Henry O. Goett is the duly incumbent City Clerk of said City of Indianapolis and in that capacity he is made a party herein.

"That the defendants E. Kirk McKinney, Louis C. Brandt and Charles O. Britton each is a duly incumbent member of, and together they constitute, the Board of Public Works of said City of Indianapolis and in that capacity each is, and they together are, made parties herein.

"That the defendants Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz and William J. Mooney each is a duly incumbent member of and together they constitute the Board of Trustees for Utilities of said City of Indianapolis, pursuant of an act of the General Assembly of Indiana, entitled: 'An act supplemental to an act entitled: "An act concerning Municipal Corporations," approved March 6, 1905,' approved March 11, 1929, and in that capacity each is and they together are made parties herein.

"That the defendants Edward A. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Ruddell and Guy A. Wainwright, each is a duly incumbent member of and together they constitute the Board of Trustees of Utilities of said City of Indianapolis, pursuant of an act of the General Assembly of Indiana, entitled 'An act supplemental to an act entitled "An act concerning Municipal Corporations," approved March 6, 1905', approved March 11, 1929, and in that capacity each is and they together are made parties herein.

"That the defendants John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh, Jere West, each is a duly incumbent member of and together they constitute the Public Service Commission of Indiana, and in that capacity they together are made parties herein.

"That the defendants Ferdinand Winter and Trust Company of America are named as trustees, with defined powers, in a certain mortgage executed by said Indianapolis Gas Company on October 1, 1902, to secure the payment of an authorized issue of \$7,500,000.00 gold bonds, to bear interest at 5 per centum per annum, of which \$4,833,000 pretend to have been issued, and as such trustees they are made parties herein.

"That the plaintiffs are inhabitants and taxpayers of said City of Indianapolis and as such are *cestuis que trustent* of the Public Charitable Trust herein defined.

(2)

"That on August 30, 1905 defendant City of Indianapolis, acting by and through its common council and its mayor, by ordinance duly enacted, ratified, confirmed and approved a certain franchise contract therefore executed on August 25, 1905, by the Board of Public Works of and for said City and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves, their associates and assigns, which said franchise contract, and the said ordinance which ratified, confirmed and approved the same, were in the words and figures following, to-wit:

.

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."

(Inserted pursuant to stipulation filed November 22, 1939.)

"Said franchise ordinance was published in a book printed and published by authority of the City of Indianapolis, entitled 'Charter and Ordinances of the City of Indianapolis', which said book was printed and published in the year 1905, and in which said franchise ordinance appears on pages 289-311, inclusive. Said Franchise ordinance was, also, published in a book printed and published by defendant City of Indianapolis entitled 'Proceedings of the Common Council of Indianapolis,' which was the journal of said Common Council from October 15, 1903, to December 15, 1905, and said franchise ordinance, and the proceedings of the Common Council relating thereto, appear in said book on pages 695-806, inclusive.

(4)

"That said defendant Citizens Gas Company was incorporated on May 23, 1906, and its Articles of Association, omitting names, signatures and acknowledgments, were as follows:

.

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Said Articles of Incorporation were recorded on the 23rd day of May, 1905 in the office of the recorder of Marion County, State of Indiana, in Miscellaneous record, Vol. 50, beginning at page 96.)

(5).

"That on May 24, 1906, said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt assigned and transferred to defendant Citizens Gas Company of Indianapolis all their rights in and to the aforesaid contract, which assignment was duly accepted by said Citizens Gas Company and thereupon said Citizens Gas Company and said City of Indianapolis agreed and entered upon a practical construction and exposition of said franchise contract as being a Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city and in carrying out such construction and exposition said Citizens Gas Company and said City of Indianapolis put into effect the following acts, towit:

(6).

"That thereupon said Citizens Gas Company took possession of the streets, alleys, avenues and public places of said city with the mains and connections of said Gas Company and erected and acquired a gas plant and continuously, thereafter, said Gas Company has operated, and does now operate, under said franchise, notwithstanding the pretense subsequently made by said company to abrogate the same.

(7).

"That thereupon said Citizens Gas Company proceeded to take subscriptions for the full amount of its authorized capital stock, viz., one million (\$1,000,000.00) dollars; that each of said subscriptions for said stock was taken upon a form of memorandum as follows, towit:

" 'Trustees:—Thos. L. Sullivan, Thos. H. Spain, W. D. Cooper, Lucius B. Swift, Henry Kahn.

" 'Directors:—Franklin Vonnegut, Lorenz Schmidt, Jas. L. Keach, Geo. J. Marott, E. H. Eldridge, Alfred F. Potts, John R. Welch, Robert Lieber, J. D. Forrest.

" 'Subscription to Stock of Citizens Gas Company of Indianapolis.

" 'Temporary Office, 1261 Law Building

" 'New Phone 361

" 'I hereby subscribe for and agree to take _____ shares (par value \$25.00) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for same at the rate of \$25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company,

as follows: 10 per cent. on demand, and 20 per cent. on the tenth day of each month thereafter (except that the last payment shall be 30 per cent.) until the full amount of said subscriptions shall have been paid.

“All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent. shall have been paid on not less than \$500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1907, then the full amount of money paid on the subscription shall be returned to subscriber by said Union Trust Company, trustee.

“I hereby agree that the stock above subscribed shall be issued to a board of five (5) trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the Articles of Incorporation under which said Company is formed; and that when the indebtedness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10 per cent. per annum, then the trustees and directors of said company shall execute proper instruments transferring all the property of said company, of every kind and description, to the City of Indianapolis, and that, thereupon, all my interest in said company and all its property shall be cancelled, released and extinguished.

“Date.

“Name.

“Address.

“Pay no money to Solicitors.’

(8.)

“That upon the incoming of said stock subscriptions executed on said memorandum, and for the uses and purposes therein stated, the same were accepted by said defendant Citizens Gas Company, and said memorandum and the said acceptance thereof became, and they were, merged into a holder's certificate in the words and figures following, to wit:

“Capital Stock \$2,000,000.00. Shares \$25.00 each.

“Trustees certificate:—Citizens Gas Company of Indianapolis.

“This certifies that (here appears name of subscriber)

is entitled to (here appear number of shares) shares of the par value of \$25.00 each of the capital stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding stock of said company, have with the consent and agreement of aforesaid owner, been issued to a board of five trustees as provided in the Articles of Incorporation of said Company and in the gas franchise granted to it by the city of Indianapolis, August 25th, 1905, and said capital stock shall be and remain under the exclusive and irrevocable control of said board of five trustees, and their successors, with full, complete, exclusive and irrevocable power in said board of trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all the uses and purposes in the Articles of Incorporation of said Company mentioned, set forth and described. The aforesaid holder of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the directors; and when said certificate-holder shall have received, by dividends or otherwise, upon said certificate, an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then this certificate shall be deemed fully paid and cancelled and the interest of said holder in said company and its assets shall thereupon cease and the property of said company shall be disposed of as provided in said Articles of Incorporation. This certificate is transferable only on the books of the Company by holder thereof in person, or by attorney on surrender of this certificate properly endorsed.

“ ‘In Witness Whereof, this certificate is signed by the president of the board of trustees, attested by the president and secretary of the board of directors, and sealed with the seal of said company this (here date of month) day of (here month of year) A. D. 19 (here year).

“ ‘(Here name of President)

“ ‘President of Board of Trustees.

“ ‘Attest: (Here name of president)

“ ‘President of Board of Directors

“ ‘(Here name of secretary)

“ ‘Secretary of Board of Directors

“ ‘For value received (here name of purchaser) hereby sell, assign and transfer unto (here names of trustees), (here number) shares of the capital stock represented by

the within certificate and do hereby irrevocably constitute and appoint (here name) attorney to transfer said stock on the books of the within named company, with full power of substitution in the premises,

“‘Date (here day and month), 19 (here year)

“‘(Here name of purchaser)

“‘In presence of (here name of Witness)

“‘Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration, or enlargement, or any change whatever.’

(9).

“That said memorandum of subscription and the Company's acceptance thereof and said holder's trustees-certificates of ownership, stated in writing the full, indivisible and entire transaction between said Citizens Gas Company and its said subscribers, save the proper and lawful reference to said franchise transferred to said company on May 24, 1905, by said Potts, Stalnaker and Schmidt, and save the proper and lawful reference to said Company Articles of Association; that thereafter said defendant, Citizens Gas Company, made no further memorandum concerning said stock except to note on its transfer books the transfer, from time to time, by assignment, of said certificate and the memorandum so made and executed by and between said Company and said subscribers constitutes a single and indivisible and entire contract and the sole contract in the premises.

(10).

“That thereupon and thereby said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt fully performed all the conditions of said franchise contract on their part to be performed and such performance was duly accepted by all parties in interest.

(11).

“That thereafter the General Assembly of Indiana confirming said contract, passed an act entitled: ‘An act regulating the making of contracts between cities having a population of one hundred thousand or over according to the last preceding United States Census, and persons, firms, associates and corporations furnishing fuel and il-

luminating gas to such cities or inhabitants thereof, fixing a standard of quality of gas for such contracts; fixing a maximum price for such gas for such contracts; providing for the submission of the question of the approval of such contracts to the voters of such cities; fixing a standard of quality below which gas furnished should not go, and a price above which consumers of such gas in such cities should not be charged by any person, firm, association or corporation occupying the streets and alleys of such cities by sufferance or having no contract governing the price of such gas; fixing the duties of persons, firms, associations and corporations to consumers of such gas in such cities where such persons, firms, associations and corporations had no contract with such cities governing the price of such gas to consumers, and where such persons, firms, associations and corporations had failed to remove their pipes and mains from the streets and alleys of such cities within a reasonable time after the expiration of their contracts governing the price of such gas with such cities; providing penalties for the violation thereof and declaring an emergency'. Approved March 4, 1907. (Acts 1907 page 149).

(12).

"Plaintiffs aver that if said Potts contract ordinance of 1905, when passed, was without legislative authority, then the act of 1907 constituted the persons named in said franchise ordinance of 1905 and their successors, a body politic and corporate under the name 'Citizens Gas Company of Indianapolis as trustee' for the term stated in the ordinance with all the powers incident to such corporation as trustees, at the expiration of which time said Citizens Gas Company became a part of the municipal city and the powers of the city, which were in the beginning inchoate as trustee, became vested as trustee. But the change in the nature and in the extent of the trustee's holding never modified the trust itself as to the beneficial interest of the cestuis que trustent. That said Public Charitable Trust is of the nature of a corporation sole with its beneficiaries the real parties in interest and the equitable owners thereof, and it may be dealt with accordingly in this suit and this right in its behalf these plaintiffs herein now claim and they ask that their said claim be determined and adjudged by this court in this suit.

(13).

"That in, by and upon the proceedings, records memoranda and agreements aforesaid, a Public Charitable Trust was created, established and confirmed for the use and benefit of the inhabitants and taxpayers of the City of Indianapolis, including these plaintiffs, in which said Citizens Gas Company and its trustees, agents, servants and representatives became the active trustee, for the time being, and the municipal city of Indianapolis became the inchoate trustee, said inchoate trusteeship to cease and to become determined, and to be transformed into an active trusteeship for the use and benefit of said inhabitants and taxpayers, when said municipal corporation should become liable, in due course of the administration of said trust, to take over the property and franchise of said Citizens Gas Company; that said trust, and said several trusteeships, constituted a single and indivisible contract and as such it ever has been, and is, entitled to protection under the contract clause of the Constitution of the United States against any impairment by the State of Indiana and this Federal right these plaintiffs now here assert and set up, and they ask that it be heard and determined and that their rights in the premises be accordingly protected and saved; that said Public Charitable Trust being for the benefit of the inhabitants and taxpayers of said city of Indianapolis be deemed to have been accepted by them, among whom are these plaintiffs.

(14).

"That there has been a substantial performance of all the conditions precedent to the changing of said inchoate trusteeship into an active trusteeship on the part of said municipal City of Indianapolis and said trust is now entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company to said Municipal City of Indianapolis as the active trustee of said Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city, among whom are these plaintiffs. And plaintiffs say that such formal and final transfer should and would have been made at this time and the title of said Municipal City as trustee should and would at this time have become and be vested and clear of all clouds but for certain wrongful and unlawful obstruc-

tions put in the way thereof by the defendants, conspiring and confederating and colluding with others, in the form and manner hereinafter more fully stated; that the said wrongful acts of the defendants and their said confederates constitute an unlawful cloud upon the title of said Municipal City, as trustee, to the said property and franchises of said Citizens Gas Company which it is the object and purpose, among other things, of this suit to remove.

(15).

"That on March 25, 1911, pursuant of Article IV of its Articles of Association, hereinbefore set out, said Citizens Gas Company increased its common capital stock from the amount of one million dollars to the amount of two million dollars, and thereafter, from time to time, until July 1, 1919, said additional one million dollars of the common capital stock was sold at public auction to the highest bidder therefor, after having given thirty days notice of the time and place of such sale by publication in three Indianapolis daily newspapers having the largest circulation, all as provided in said Article IV of said Articles of Association. That in each of said published notices of sale, it was specifically stated that all said stock sold should be issued and acquired in all respects conformably to the terms and conditions of the Articles of Incorporation of said Citizens Gas Company, relating to such sale of stock. That in said sales of stock the conditions imposed by said Articles of Incorporation were complied with and said trustees certificates were accordingly issued to said purchasers of said stock and said stock was assigned to said trustees in trust.

(16).

"That on November 29, 1911, said city of Indianapolis and said Citizens Gas Company of Indianapolis, made with each other and entered into a supplemental agreement intended to amend certain provisions in the said franchise contract of August 25, 1905, thereafter confirmed by ordinance, made by and between said City of Indianapolis as one party and said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as other party. That said supplemental agreement of November 29, 1911 is exhibited at large in General Ordinance No. 86, 1911, passed by the common council of said City of Indianapolis and approved May 22, 1911, which said ordinance

was duly published and appears in General Ordinance record 13, page 341, of the ordinances of said City and it is in the words and figures following, towit:

“General Ordinance No. 86, 1911.

• • • • •
“(Here follows the Agreement of November 29, 1911, between the City of Indianapolis and Citizens Gas Company, modifying the Franchise Contract of August 25, 1905, which Agreement appears as part of Exhibit C to the bill (I R. 108-112)).”

(Inserted pursuant to stipulation filed November 22, 1939.)

“That said amending ordinance was approved by S. L. Shank, Mayor, on May 12, 1912, and was published in General Ordinance Record 13, page 341. It was published also, in the Municipal Code of the City of Indianapolis, 1917, pages 454-457.

“That said amending ordinance being in aid of said Public Charitable Trust and for the benefit of the inhabitants and taxpayers of said City of Indianapolis, its acceptance by them will be implied.

(17).

“That in part performance of said Public Charitable Trust and in aid thereof, said Citizens Gas Company acquired property of the great value, towit, \$20,000,000.00; that all said property became and it is impressed with said Public Charitable Trust; that plaintiffs herein have attempted to describe all said property according to its classification, and without particular enumeration of all the various specific items which compose any class; that if any item shall have been omitted herefrom, or shall be hereafter acquired or shall be inaccurately described herein, plaintiffs ask leave, upon discovery, to describe such newly discovered item and to include its enumeration herein and to make any proper correction as a part of this complaint, to the end that all the assets and property of said Citizens Gas Company, of whatsoever kind and wheresoever situate, may be brought properly within the issues of this suit and dealt with accordingly.

“That defendant Citizens Gas Company of Indianapolis, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manu-

facture, storage and distribution of artificial gas and the by products thereof, together with pipe lines, mains and other necessary equipment for the distribution of artificial gas in the City of Indianapolis, and, also, a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situate in the city of Indianapolis, Marion County, State of Indiana, and is more particularly described as follows, to wit:

.

“(Here follows a detailed description of the property of the Citizens Gas Company).”

(Inserted pursuant to stipulation filed November 22, 1939.)

That said Citizens Gas Company of Indianapolis also, has acquired title to and owns certain leasehold rights in coal lands located in the counties of Raleigh and Fayette, in the State of West Virginia, useful and used for the purpose of producing therefrom coal for use in the operation of the business of defendant Company.

(18).

“That defendant Indianapolis Gas Company pretends to have been organized in 1891 pursuant of said act of the General Assembly of Indiana entitled ‘An act for the incorporation of manufacturing and mining companies and companies for mechanical chemical and building purposes’, approved May 20, 1852; that no articles of association of said Indianapolis Gas Company have ever been filed, or are on file, in the office of the Secretary of State of Indiana, but in lieu thereof, there appears a certified copy of an order of the Marion Circuit Court of Indiana changing the corporate name of Electric Lighting, Gas Heating and Illuminating Company to Indianapolis Gas Company; from this certified copy of decree the following facts may be traced chronologically, to wit: On April 3, 1876, there was approved a general ordinance enacted by the common council of said city of Indianapolis investing Robert Dickson and his associates and their assigns with the privilege of furnishing gas to the City of Indianapolis and the inhabitants thereof, upon certain conditions therein named; pursuant of the conditions of the franchise granted Dickson and others, they incorporated a company shortly after the adoption of the ordinance, which was known as the ‘Citizens Gas Company’, and to that com-

pany the franchise was turned over. The 'Citizens Gas Company' constructed a gas-works plant on West Pratt Street and engaged in business of furnishing gas under this ordinance. A short time before 1880 the plant was damaged by an explosion and fire. Financial trouble ensued and as a result of the litigation in the Superior Court of Marion County, Indiana, the franchise was sold, as well as the entire plant, by the Sheriff. The purchaser was John S. Tarkington, who in 1881, incorporated a company known as the 'Electric Lighting, Gas Heating and Illuminating Company' with capital stock fixed at \$100,000.00.

"The Articles of Association contained no provision subjecting them to revision or change by the State of Indiana. At the expiration of the year for redemption from said sheriff's sale, there having been no redemption, the sheriff's certificate was assigned to the company which had been organized by John S. Tarkington and all the property of the Citizens Gas Company was conveyed to the Tarkington Company. There does not appear any record of the dissolution of 'Citizens Gas Company'. The 'Electric Lighting, Gas Heating and Illuminating Company' appears to have done business in that name until 1890 at which time that company, the Indianapolis Natural Gas Company and the Indianapolis Gas Light and Coke Company were purchased by E. C. Benedict and others, of Philadelphia, and consolidated into the Indianapolis Gas Company, the latter name having been authorized by said decree of the Marion Circuit Court. The Indianapolis Gas Company appears to claim a direct succession from the original Electric Lighting, Gas Heating and Illuminating Company, the chartered duration of which was limited to expire in 1931. Other than as indicated the Indianapolis Gas Company does not appear to have had any franchise from the City of Indianapolis. On November 9, 1907, it appears that the capital stock was increased to \$2,000,000.00. The Indianapolis Gas Company *eo nomine* does not appear to have had any franchise from the city of Indianapolis to operate an artificial gas plant but on May 12, 1890, it filed its acceptance of the general ordinance of June 27, 1887, concerning the use of streets and public places for supplying the city of Indianapolis and its inhabitants with natural gas. Since 1904 no company has supplied natural gas in Indianapolis.

(19).

"That on to wit the 1st day of January, 1913, the defendant Indianapolis Gas Company was the owner of, and was operating a gas plant in said city of Indianapolis through which it supplied gas for fuel and illuminating purposes to the inhabitants of said city; that there and then said Indianapolis Gas Company's said plant included about 375 miles of mains and pipes of various sizes, theretofore laid and devoted to the distribution of natural gas and at the time existing by sufferance only, in the streets and alleys of said city, together with certain coal-gas and water-gas plants used in the manufacture of artificial gas for sale by said Indianapolis Gas Company; that a large part of said gas mains were old, much having been in the ground for twenty years and more, and large portions of them were in bad repair and rotten, and weakened by having been buried in the ground for such length of time, and by electrolysis; that said coal-gas and water-gas plant were obsolete and incapable of producing gas at a cost which would enable said company to sell said gas at a profit in competition with a plant efficiently constructed and equipped and operated according to modern methods, and selling within the price fixed by the laws of Indiana. That the condition of the system pursued by said Indianapolis Gas Company and the obsolete character of its plants and machinery were such that said company had not been able to do a profitable business for many years and it had not, at that time, been able to pay any dividends to its stockholders for twenty years and it had been compelled to borrow money with which to pay interest on its bonds and other fixed liabilities; that the capital stock of said company was \$2,000,000.00 and its bonded indebtedness was stated to be \$4,833,000.00, which capitalization and bonded indebtedness were largely in excess of the actual value of all the property of said company; that a fair and reasonable value of all the property, real and personal, of said gas company was \$1,223,250.00 which included an office building of the fair and reasonable value of \$400,000.00; that said office building is not used, nor useful, in the production of gas and it is subject to the lien of a preferred stock issue of \$300,000.00, due to mature in December, 1931; that the total net value of all the property of said Indianapolis Gas Company, used and useful in the manufacture of gas, was not to exceed \$923,250.00, and said

company was unable to liquidate its indebtedness and was insolvent; that at that time said E. C. Benedict of Philadelphia, Pennsylvania, commonly called "Commodore" Benedict, and his associates were in financial and administrative control of said Indianapolis Gas Company and Benedict was its president and he was thoroughly informed as to the said condition of said Company and as to the gas-production situation in said city of Indianapolis.

(20).

"That on towit said 1st day of January, 1913 one J. D. Forrest was the general manager of said Citizens Gas Company and, notwithstanding the subordinate title of his office, he was largely in actual control of all the affairs of said Citizens Gas Company and he was thoroughly informed as to the condition and methods of said Citizens Gas Company, and as to the condition and methods of said Indianapolis Gas Company and as to the gas production situation in said city of Indianapolis.

"That on tovit, said 1st day of January, 1913 one Volney T. Malott, one Linneas C. Boyd and one Clarence L. Kirk were capitalists of said city of Indianapolis, who worked together and were commonly known in financial circles as the Malott interests, and each of them was thoroughly informed as to the gas situation in Indianapolis and as to the condition the plans, the purposes and methods of both said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company.

"That on towit January 1, 1913, said Commodore Benedict and J. D. Forrest came to a mutual understanding and accord and thereupon they conspired, confederated and agreed together, pretending that said Benedict should retire from the gas competitive field of Indianapolis, leaving said territory wholly open to the use of said Citizens Gas Company and saving said Indianapolis Gas Company only from complete destruction, but, in fact, they planned that said Forrest should get advantages and emoluments arising upon putting into effect a financial composition involving many millions of dollars and that said Benedict should save to himself and his associates a nominal value out of the common stock of said Indianapolis Gas Company and the face value of a pretended mortgage, purporting to have been executed on October 1, 1902 to secure an authorized issue of \$7,500,000.00 gold payment bonds bearing interest at 5 per

centum per annum and due fifty years after date and of which Ferdinand Winter and Trust Company of America were nominal trustees; that thereupon said Forrest-Benedict interests solicited and engaged said Malott-Boyd-Kirk interests to enter said conspiracy upon assurance that they should acquire at a preferential price the common stock of said Indianapolis Gas Company and that all interests should work together to destroy said Public Charitable Trust and divert the earnings of said Citizens Gas Company, and the revenues which properly belonged to said Public Charitable Trust, into the funds and holdings, by any possible course of direction or indirection, of said Malott-Boyd-Kirk interests; and to such effect said confederates then and there conspired and agreed together; that thereupon said trades were consummated and upon their consummation said confederates, through agencies of publicity and finance, took control of the policy of said Citizens Gas Company and of its officers, servants and representatives, including the said trustees of said Public Charitable Trust.

"That thereupon it was designed by said confederates that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the constitutional restrictions of the state and by those means destroy said Public Charitable Trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burden of replacing said Indianapolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said city of Indianapolis.

(Note: The matter indicated supra with distinguishable type is the matter which the court ordered be struck out of the complaint.)

"That thereupon and with the aid of publicity and large financial resources said confederates began to act, and they have so accomplished their said ends as that the following events and acts appear to their advantage, to wit:

(21).

"On the 4th day of March, 1913 there was approved an act of the General Assembly of Indiana, to take effect on the 1st day of May, 1913, entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission' (Acts 1913, 167).

(22).

"That on the 21st day of May, 1913, and pursuant of said conspiracy on the part of said Benedict-Forrest and said Malott-Boyd-Kirk interests, and in the carrying of said conspiracy into partial effect, said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company pretended to agree together to unite, and accordingly they did unite, in a pretended petition in common to said Public Service Commission, to authorize said Indianapolis Gas Company, as lessor, to lease its plant and property to said Citizens Gas Company as lessee which petition, omitting the signatures and attestations of the proper officers of each of said companies, was in substance, to wit:

• • • • •
"(Here follows the joint petition of Citizens Gas Company of Indianapolis and The Indianapolis Gas Company to the Public Service Commission, previously set forth as part of Plaintiffs' Stipulation Exhibit 13)".

(Inserted pursuant to stipulation filed November 22, 1939.)

(23).

"The pretended finding and order of the commission purporting to approve and confirm said lease were made and entered of record on October 1, 1913. The order provided inter alia that before the lease should become effective the Indianapolis Gas Company should surrender its franchise with the City of Indianapolis and take an indeterminate permit from the Public Service Commission. And this was attempted to be done.

"The pretended contract of lease as entered into in accordance with the pretended order of the Public Service Commission, omitting its caption, signatures and attestations contained the following provisions:

“(Here follows a copy of the Lease between Indianapolis Gas and Citizens Gas, a copy of which is attached to the bill as Exhibit B (I R. 51-80))”.

(Inserted pursuant to stipulation filed November 22, 1939.)

(24).

“That said Citizens Gas Company of Indianapolis has well and truly performed all the obligations imposed upon it by said pretended lease and in so doing it has laid out and expended of the moneys, funds and property of the taxpayers of said city, among whom are included these plaintiffs, for the use and benefit of said Indianapolis Gas Company, a large sum, including interest thereon, to wit, ten million dollars, which sum, except for this suit, will be wholly lost to said taxpayers and residents; that particular items which have entered into said payments, with interest thereon, are as follows, to wit:

| Year | Rental | Extensions | Taxes | Interest | Total |
|-------|----------------|----------------|----------------|--------------|-----------------|
| 1920 | \$ 401,802.00 | \$ | \$ 145,242.70 | \$ | \$ 546,844.70 |
| 1921 | 401,350.43 | 178,113.60 | 105,228.68 | 32,810.68 | 717,503.39 |
| 1922 | 408,702.53 | 116,629.55 | 108,615.59 | 73,892.24 | 707,239.91 |
| 1923 | 417,838.89 | 131,888.90 | 124,515.09 | 81,051.06 | 755,293.94 |
| 1924 | 428,075.25 | 134,293.66 | 137,543.83 | 87,312.40 | 787,185.14 |
| 1925 | 437,187.65 | 183,961.14 | 150,004.06 | 93,500.98 | 864,653.83 |
| 1926 | 451,004.61 | 236,750.76 | 142,695.55 | 101,708.68 | 932,209.58 |
| 1927 | 456,040.95 | 21 95.75 | 143,920.60 | 104,546.21 | 914,773.51 |
| 1928 | 463,226.76 | 122 75 | 146,594.79 | 99,418.97 | 841,628.37 |
| 1929 | 463,226.76 | 132.5 | 146,594.79 | 95,032.26 | 837,139.63 |
| <hr/> | | | | | |
| | \$4,328,295.83 | \$1,456,049.06 | \$1,350,955.68 | \$869,271.48 | \$87,904,572.05 |

“That said payments with interest thereon in their aggregate are more than ten times the entire value of all the property of said Indianapolis Gas Company and said Indianapolis Gas Company is insolvent; that said pretended petition by said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company of May 21, 1913, is ultra vires said Citizens Gas Company, its officers, agents, servants and representatives, and of said trustees and it is wholly void; that said pretended lease of October 1, 1913, ordered and directed to be executed by said Public Service Commission is in contravention of the contract clause of the Constitution of the United States for that it impairs the charter of said Citizens Gas Company and it impairs, also, the said contract of August 25, 1905, by and between the City of Indianapolis by and

through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, approved on August 30, 1905, by General Ordinance No. 72 as exhibited in General Ordinance Record 12, page 244; wherein and whereby said Public Charitable Trust was created; that these plaintiffs specially set up and claim the protection in this their suit, of said contract clause of the Constitution of the United States and they ask the Court that their said claim of protection be heard and sustained herein; and likewise these plaintiffs specially set up and claim the protection in this their suit, of the contract clause of the constitution of the State of Indiana and they ask the Court that their said claim of protection be heard and sustained herein.

"And these plaintiffs further say that said act of the General Assembly of Indiana of March 4, 1913 pretending to create said Public Service Commission is void for that it is in contravention of the constitution of Indiana concerning the formation of corporations, in this, that said constitution withholds from the General Assembly all authority to authorize charters or substitute charters in the form of permits of any kind to any corporation except under general laws and such charters and permits never can be authorized nor granted upon the special petition of any person, firm or corporation; that forasmuch as said Public Service Commission is an unlawful body and wholly without any authority and power under the Constitution of Indiana its said pretended order of lease of October 1, 1913, is wholly void and it takes the property of these plaintiffs without due process of law and in the denial of the equal protection of the law in contravention of the fourteenth amendment of the Constitution of the United States, and these plaintiffs now specially set up and claim in this their suit the protection of the Fourteenth Amendment of the Constitution of the United States and they ask that the court hear and sustain their said claim herein.

(25).

"That all the defendants herein, were either parties to the said conspiracy in the beginning as formed by and between the said Benedict-Forrest interests and the Malott-Boyd-Kirk interests, or, if not so involved in the beginning, said persons thereafter made themselves parties to said conspiracy by acceptance, ratification and adoption and they are now engaged in and about carrying out details of

said conspiracy and making the same effective to the purposes for which it was created; that said Ferdinand Winter and the Trust Company of America were named, and their powers defined as trustees, in a certain pretended mortgage executed on, to wit, October 1, 1902, by said Indianapolis Gas Company pretending to secure the payment of an authorized issue of \$7,500,000.00, gold payment 5 per centum per annum bonds, due fifty years after date and of which authorized sum \$4,833,000.00 may have been issued; that plaintiffs are not advised as to the consideration, if any, attending said issue of bonds, nor as to their existence at this time nor as to their legality, nor as to their value, sufficiently to admit the same and therefore, plaintiffs deny the existence, the legality and the value of said issue of bonds and the priority of said mortgage as against the claim and right of said Public Charitable Trust, and of said City of Indianapolis as trustee, and of said receiver to be appointed herein, for money laid out and expended, without consideration therefor, in and about the replacement, preservation and maintenance of said mortgaged property, and said mortgage trustees are made parties defendants herein to answer to their interest and to defend said mortgage against this suit to defeat the lien of said mortgage and to quiet title against the same, or on default said trustees to suffer the removal of said mortgage lien from said property, and the determination and adjudication that the lien of said mortgage should be and is junior and inferior in right and equity to the lien of said city as trustee, and of said Public Charitable Trust, and of the receiver to be appointed herein, for said moneys laid out and expended to replace, preserve and maintain said mortgaged property and that said mortgage should be determined and adjudged to be an unlawful cloud upon said Public Charitable Trust and that the title of said Public Charitable Trust and of said City of Indianapolis, as trustee, as against said pretended mortgage lien should be forever quieted and that said mortgage trustees should be summoned and required to answer accordingly herein.

“That said City of Indianapolis its officers and representatives never have taken, and they are not now taking, any affirmative action to preserve and rescue said Public Charitable Trust and to execute and carry the same into effect in the terms in which it was created and established but on the contrary the policy and conduct of said city, its officers and representatives has been and is to aid and assist to make effective the purposes and objects of said conspiracy

and to obstruct the execution of said trust in the terms in which it was created and the performance of the duties of trustee thereby imposed upon said municipal city, so that unless these plaintiffs, as inhabitants and taxpayers of said city, for their own use and benefit, and for the use and benefit of all other persons similarly situate, can maintain this suit, said Public Charitable Trust will be defeated and wholly destroyed, to the irreparable loss and injury of the cestuis que trustent of said trust, and for which they can have no adequate remedy at law; that the conduct and acts of said City of Indianapolis, its officers, agents, servants and representatives constitute, and is, in effect, a repudiation of said trust and a renunciation of said office of trustee.

(26).

“That on August 27, 1921, said Citizens Gas Company further in aid of said conspiracy herein described and acting under the control, and at the direction of the members thereof, filed with said Public Service Commission a pretended declaration of surrender of its said franchise with the City of Indianapolis, which said declaration was in substance towit:

“ ‘Declaration of Surrender of Licenses,
Permits and Franchises by
Citizens Gas Company of Indianapolis

“ ‘This Indenture Witnesseth, That Citizens Gas Company of Indianapolis, a corporation duly organized and existing under the laws of the State of Indiana, and which is the owner and operator of by-product gas plants in the City of Indianapolis, Indiana, and is a public utility, declares that it hereby surrenders each and every license, permit and franchise from the city of Indianapolis, Indiana, now owned or held by it and under or by virtue of which said Company is operating its gas utility or any part thereof, in said city; and hereby accepts indeterminate permits in lieu of said licenses, permits and franchises hereby surrendered as provided in the Act of the General Assembly of the State of Indiana entitled “An Act concerning public utilities creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.” approved March 4, 1913, and acts amendatory thereof or supplemental thereto; but if said act shall be repealed or annulled, then said Company shall be reinstated in the possession and enjoyment of all the licenses,

permits and franchises hereby surrendered as provided in said Act.

“ ‘In Witness Whereof, the said Citizens Gas Company of Indianapolis has this 12th day of August, 1921, caused its name to be hereunto subscribed by its President and its corporate seal hereto affixed, attested by its Secretary duly authorized thereto by resolutions of the stockholders and directors of said Company, duly adopted at meetings of said stockholders and directors duly called and held.

“ ‘Citizens Gas Company of Indianapolis,

“ ‘By John R. Welch, President.

“ ‘Attest: J. D. Forrest, Secretary.

“ ‘Certificate.

“ ‘This is to certify that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis filed in the office of the Clerk of the city of Indianapolis, Indiana, a declaration, of which the above is an exact copy.

“ ‘Geo. O. Hutsell, Clerk of the City of Indianapolis.’

(27).

“That on December 12, 1921, said Public Service Commission entered its order pretending to approve the simulated declaration of surrender of franchise by said Citizens Gas Company of Indianapolis from said City of Indianapolis, which said order was in substance, to wit:

“ ‘The commission being fully advised in the premises finds that said Citizens Gas Company of Indianapolis, Indiana, has filed its written declaration, as provided by the public service commission act, surrendering all licenses, permits and franchises from the City of Indianapolis, Indiana now owned or held by the petitioner herein in accordance with the provisions of said act and that said Company receives in lieu thereof by operation of law an indeterminate permit to be held under all the terms, conditions and limitations of said act.

“ ‘It is therefore ordered by the Public Service Commission of Indiana, that said declaration and all instruments in writing filed by said company in the matter shall be filed in the office of the secretary of the commission kept on file as a record of said surrender’.

“That said order of December 12, 1921, entered by said Public Service Commission and purporting to approve the declaration of surrender of franchise by said Citizens Gas

Company from said City of Indianapolis is unlawful and void for each of the reasons following, towit:—

“1. In and by the provisions of the constitution of Indiana the franchises of corporations are immutable and cannot be changed so as to affect existing rights, and the laws in relation thereto are inflexible; that a rule prescribed in the constitution of other states to the effect that corporation charters and franchises shall be issued subject to the right of the state to enact subsequent laws changing said charters and franchises of corporations does not prevail, and never has prevailed, in Indiana, but, on the contrary, all corporations must be formed and must operate under general laws made without participation by any corporation in the legislative endeavor and no permit, license nor privilege shall be granted to one corporation upon its own terms, or petition reciting special and particular facts which does not pertain to all corporations alike under general laws and no permit, license or privilege may be granted to affect retroactively a charter or franchise which has once issued; that forasmuch as the General Assembly is without power to grant any permit, license, or privilege to any one corporation which does not pertain to all corporations alike under general laws and is without power to grant any permit, license or privilege to affect retroactively any charter or franchise which has once issued, so the General Assembly is without power to authorize any person, subordinate to said General Assembly, to grant any permit, license or privilege to one corporation which does not pertain to all corporations alike under general laws and is without authority to grant any permit, license or privilege which shall affect retroactively any charter or franchise which has once issued; that in consideration of the premises said act of the General Assembly of the State of Indiana entitled ‘An act concerning public Utilities, creating a Public Service Commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission’, approved March 4, 1913, is unconstitutional and void in so far as it attempts to confer any authority on said commission to grant any permit, license or privilege to one corporation which does not pertain to all corporations alike under general laws; that the franchise which said Citizens Gas Company of Indianapolis simulated to surrender was local and it was specific in its provisions and it carried with it a Public Charitable Trust to which the inhabitants and taxpayers of said city were cestuis que trustent, so that the pretended

indeterminate permit granted by said Public Service Commission was special and did not pertain to all corporations alike, and said cestuis que trustent never assented thereto.

"2. In and by the constitution of Indiana, corporation franchises are immutable contracts and they cannot be impaired by the state because of the contract clause of the state constitution, towit, Article 1, section 24 of the constitution of Indiana; that the franchise which said Citizens Gas Company of Indianapolis simulated to surrender carried with it contractual provisions creating a Public Charitable Trust in which the inhabitants and taxpayers of said city of Indianapolis, including these plaintiffs were cestuis que trustent and which Public Charitable Trust was not perpetuated in said indeterminate permit; that said Public Charitable Trust came within the protection of said contract clause of the constitution of Indiana and was inviolate, and this right these plaintiffs now assert and claim, and they ask that it be adjudged and determined by this court in this suit, and they say that said cestuis que trustent never assented to the surrender of said franchise.

"3. In and by the constitution of Indiana, Article 6, section 6, municipal officers 'shall reside within their respective counties, townships, and towns and shall keep their respective offices at such places therein'; that at the time said constitution was adopted there were no cities in Indiana but the Supreme Court has construed the word 'town' to be generic and to include cities; that members of said Public Service Commission do not reside in said City of Indianapolis nor hold offices therein; that said order of said Public Service Commission is not a municipal ordinance and was not enacted nor published as a municipal ordinance and said order is in contravention of the constitution of Indiana and is void.

"4. In and by the Constitution of the United States corporation franchises are immutable contracts and they cannot be impaired by the state because of the contract clause of the Constitution of the United States, towit, Article I, section 10; that the franchise which said Citizens Gas Company simulated to surrender carried with it contractual provisions creating a Public Charitable Trust in which the inhabitants and taxpayers of said City of Indianapolis were cestuis que trustent and which said Public Charitable Trust was not perpetuated in said indeterminate permit; that said Public Charitable Trust came within the protection of said contract clause of the Constitution of the United States and was inviolate, and this right these plain-

tiffs now assert and claim and they ask that it be determined and adjudged by this court in this suit, and they say that said cestuis que trustent never assented to the surrender of said franchise.

"5. That on April 19, 1816, James Madison, as President of the United States of America, approved an act of the Congress entitled 'An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on equal footing with the original states'; that the first section of said act was as follows, to wit: 'Section 1. Be it enacted by the Senate and House of Representatives of the United States, in congress assembled: That the inhabitants of the territory of Indiana be, and they are hereby authorized, to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever;' that said act of the congress carried with it an offer to said people that they should have the right to interpret their own institutions; that afterwards, on June 29, 1816, the representatives of the people of the territory of Indiana, in convention met at Corydon, on Monday the tenth day of June, 1816, adopted an ordinance of acceptance of the provisions of said act of Congress of April 19, 1816; that said act of Congress and said ordinance of acceptance together constituted a contract within the protection of the contract clause of the Constitution of the United States and said contract was ever thereafter inviolate; that following upon the adoption of said ordinance of acceptance said representatives of the people, met at Corydon, proceeded to carry out the terms of said compact founded upon said act of the Congress, and said offer to said people of their right to interpret their own institutions and accordingly they formed for themselves a constitution and state government in which constitution they reserved the power of amendment of the Constitution; that pursuant of such right of interpretation and of said reserved power of Amendment the people of the State of Indiana thereafter adopted their present state constitution, to take effect on November 1, 1851, superseding the constitution of 1816; that Article IV of the present Constitution is devoted to the law-making authority of the state which is vested in a general assembly, which is defined and its province prescribed, and therein is included a definition of what shall constitute 'the law' of Indiana, to wit: 'Section 1. The

legislative authority of the state shall be vested in the General Assembly, which shall consist of a senate and house of representatives. The style of every law shall be: "Be it enacted by the General Assembly of the State of Indiana", and no law shall be enacted except by bill;" that thereafter the Federal government adopted the fourteenth amendment of its constitution, which became effective, according to the proclamation of the secretary of state, on July 28, 1868; that in said amendment provision is made in restraint of law of the state including: 'Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;' that at the time said Fourteenth Amendment was adopted the words 'equal protection of the law' and 'due process of law', each had a defined and accepted meaning in the jurisprudence alike of the United States and of the several states including the state of Indiana and thereby 'the law' was meant to be 'the law' as previously declared, and said fourteenth Amendment was adopted in acceptance of those meanings of 'the law', and those meanings cannot be changed by any authority less than the constitution itself, and this inviolability of the meaning of 'the law' these plaintiffs now set up and claim as a federal right and they ask this court to determine and adjudge the same in this suit, and to adjudge that said Public Service Commission is incompetent to declare 'the law' or to define 'the law' and that the promulgation of orders made after the fact by said Public Service Commission are null and void, and are wholly inadequate as a foundation, to support any revision or any supervening order by any governmental authority whatsoever; and this right to have the corporation laws of Indiana held to be and to have them maintained inviolate and not exposed retroactively to any change by the general assembly or by the Public Service Commission of Indiana, or by any other authority whatsoever, these plaintiffs now set up and claim as a right arising under the contract clause of the Federal Constitution and under the laws of the United States, and they ask that their said claim be determined and adjudged by this court in this case, and, that said act of March 4, 1913, be adjudicated to be unconstitutional and void, and that each of the said orders of said Public Service Commission of Indiana herein set forth be held to be without any authority in law and void, including that said orders, and any of the a are not competent in law to confer a right of revision upon any tribunal

or body whatsoever, whether of the state of Indiana, or of the United States.

"That said act of March 4, 1913, and each of the proceedings had and taken and each of the orders made and entered thereunder, constitute an unlawful cloud upon the title of said Public Charitable Trust which should be removed by the judgment and decree of this court in this suit and said title should be forever cleared of said cloud.

(28).

"That since the entry of said order of December 12, 1921, there have been various simulated petitions by said conspirators acting in the name of said Citizens Gas Company to said Public Service Commission concerning rates and in re-action, to said petitions there have been various pretending orders made and promulgated by said Public Service Commission concerning said rates; that each and all said petitions were in aid and furtherance of said conspiracy herein described and each and all said pretended orders of said commission were unlawful and void; that each of said separate proceedings presents questions of law similar to the question which arises upon said proceedings which originated in said simulated petition of August 27, 1921 and because of their similitude it would be impertinent to burden this complaint with an iteration of the details of said subsequent proceedings, with this exception however, to wit: On April 7, 1922, said Citizens Gas Company filed its simulated petition with said Public Service Commission for authority to increase its rate for gas, furnished to the inhabitants of said city, to \$1.25 per unit of 1000 cubic feet which petition was docketed as cause No. 6969, and was denied; that upon the denial of said petition said conspirators acting in the name of said Citizens Gas Company filed its bill of complaint in the United States District Court for the District of Indiana in which bill said company stated the proceedings had before said Commission; averred that the order made by the commission was a confiscatory 'law' and in contravention of the Fourteenth Amendment of the Constitution of the United States and asked as relief that said commission be enjoined from interfering with the establishment of a rate of \$1.25 per unit of 1000 cubic feet for gas furnished to the inhabitants of said City; that said Federal Court sustained said bill and granted the prayer thereof and entered an injunction restraining said commission from interfering with said rate of \$1.25 per unit as aforesaid; that said proceedings in said

court were beyond its jurisdiction and were void because said Federal Court was asked to and it did grant a relief which superimposed the Fourteenth Amendment upon the contract clause of the Constitution of the United States to the effect of the latter's nullification; that there can be no confiscation, nor any taking of property without due process of law, nor in denial of the equal protection of the law, where the affected rights of the respective parties in interest are contractual; that a confiscation can occur only where rates are imposed by law, as distinguished from rates provided for by contract and then only the Fourteenth Amendment can have any application; that no rates ever had been imposed by law upon said Citizens Gas Company and the only lawful rates it ever could charge were those fixed by said franchise schedule of 1905; that forasmuch as said injunction of said United States District Court was without jurisdiction and void the said order of said Public Service Commission is void.

"That said proceedings in said United States District Court are of no effect and are void as to said Public Charitable Trust for the reason that said Public Charitable Trust was not a party to said proceedings and its rights in the premises were not presented to the Court nor heard and determined in said suit.

(29).

"That the said pretended agreement of lease made and entered into on September 30, 1913, by and between the Indianapolis Gas Company, as lessor, and the Citizens Gas Company of Indianapolis, as lessee, was ultra vires said Citizens Gas Company, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been ab initio, void and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit.

"That said pretended agreement of lease made and entered into on September 30, 1913, by and between the Indianapolis Gas Company, as lessor, and the Citizens Gas Company of Indianapolis as lessee, was brought about and made effective, and has been maintained throughout, because of the wrongful conspiracy by and between said Benedict-Forrest interests, on the one hand, and said Mallott-Boyd-Kirk interests and their respective and several allies and confederates as successors in interest, on the

other hand, by reason whereof said Citizens Gas Company of Indianapolis was and is corruptly and fraudulently deprived of and denied the good faith and fidelity of its own officers, servants and representatives, in council, in negotiations and in conduct, in and about all matters pertaining to said lease, by reason whereof said lease was in the beginning and ever has been and is now wrongful and unlawful and in this suit it should be determined and adjudged to be void and to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit.

"That said pretended agreement of lease made and entered into on September 30, 1913, by and between said Indianapolis Gas Company, as lessor, and said Citizens Gas Company, as lessee, was wrongfully and unlawfully brought about and imposed upon said Citizens Gas Company by the Public Service Commission of Indiana, that the order of said Public Service Commission approving said pretended lease and all the subsequent orders of said Commission pertaining thereto, impaired the contract of said Public Charitable Trust in contravention of the contract clause of the Constitution of the United States and of the contract clause of the Constitution of the State of Indiana, and in this suit should be determined and adjudged to be void.

"That because said pretended agreement of lease made and entered into September 30, 1913, by and between said Indianapolis Gas Company, as lessor, and said Citizens Gas Company of Indianapolis, as lessee, was unlawful and void, it furnishes no consideration for the moneys laid out and expended by said Citizens Gas Company for, and to the benefit and use of, said Indianapolis Gas Company and said moneys should be recovered through the instrumentality of a receivership, to be created in this suit, as moneys had and received by said Indianapolis Gas Company in the sum, to wit, ten million dollars.

(30).

"That said City of Indianapolis its officers and representatives and their confederates well knowing the condition of said Public Charitable Trust and the wrongs which had been committed against it, and designing how they could deceive the taxpayers and inhabitants of said city, who were and are the *cestuis que trustent* of said Trust, caused and procured the General Assembly of the State of Indiana to pass an act entitled 'An act supplemental to

an act entitled "An act concerning municipal corporations" approved March 6, 1905,' approved March 11, 1929; that said act of March 11, 1929 is unconstitutional and void upon the same grounds that said act of March 4, 1913 purporting to create said Public Service Commission, is unconstitutional, viz. that it is in contravention of Article IV section 1 of the Constitution of Indiana in each of the several particulars towit: (1) That said act attempts to confer upon, and to ratify, approve and confirm in the Public Service Commission of Indiana, legislative authority; that said Public Service Commission is not composed of two houses, as provided in said section 1 of Article IV of the Constitution of Indiana and it is not elected by the people, but is appointed by the governor, and the members thereof are not appointed according to districts, but are appointed at large and capriciously by the governor and at least nine of the congressional districts of the state and at least eighty-seven counties of the state are wholly disfranchised in the selection of said commissioners, in contravention of Article I section 23 of the Constitution of Indiana; (2) That the pretended orders of said commission in the premises are not, nor is any one of them, styled 'Be it enacted by the General Assembly of the State of Indiana', nor is any one of said orders a law enacted by bill as provided and defined in said Article IV section 1; (3) Nor is any one of said orders preceded with a title to express the subject matter of said order and matters properly connected therewith, as provided in said Article IV section 19; (4) Nor is any one of said orders a general law as provided in said Article IV section 23; (5) Nor is any one of said orders published as provided in said Article IV section 28; (6) Nor is any one of said orders signed or vetoed by the governor as provided in Article V section 14 of the Constitution of Indiana, and said Public Service Commission is wholly without any authority whatsoever to speak for and represent the people of Indiana as a law making body; (7) That said Public Service Commissioners are not residents of any one and single county, township, or town within which they keep their office, as required concerning municipal officers by Article VI section 6 of the Constitution of Indiana.

"That the defendants, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz and William J. Mooney, pretending to be the Board of Trustees for Utilities and Edward H. Kahn, Henry L. Dithmer, Eli Lilly,

Brodehurst Elsey, John J. Madden, Almus G. Ruddell and Guy A. Wainwright, pretending to be the Board of Directors for Utilities of said City of Indianapolis, are made defendants herein to answer to their interest; that said defendants pretend to hold office and to exercise authority pursuant of said act of the General Assembly of the State of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipal corporations"' approved March 6, 1905,' approved March 11, 1929, but plaintiffs say that said pretenses are wholly without right and unlawful and they constitute a cloud upon the title of said Public Charitable Trust, which should be removed in this suit; and for that said act is, further in contravention of Article IV section 19 of the Constitution of Indiana; that said act consists of twenty sections bearing upon subjects wholly unrelated and not connected with one another and that neither of said subjects, and the matters properly connected therewith, is mentioned in the title of said act; that the title 'An act supplemental to an act' etc., is no title at all within the meaning of said Article IV section 19; that the statement that the act is 'Supplemental' is a mere conclusion of law and it has no proper place in the title of an act of the General Assembly; that said word 'supplemental' contains no verb and it states no object and no purpose; that the effect of a statute is a matter for juridical determination and applies alike to all statutes whether the object and purpose be 'to amend', 'to repeal', 'to authorize', 'to provide for', 'to establish', etc.; that the legislature has plenary power to declare its own objects and purposes, but it is for the judiciary to determine whether such object and purpose when declared has been attained; that if the legislature can by enactment establish its own accomplishments, it can thereby enact laws as to which judicial inquiry will be foreclosed, in contravention of Article III of the constitution. The legislature has from time to time attempted to declare that the different sections of a statute were independent of one another and that the failure of one section should not affect others; also, it has attempted to declare that a statute was 'declaratory' as in defining public offences, and thereby of restrictive meaning, or that it was 'remedial' as in defining liens of working men and therefore of liberal meaning, but in all such cases the legislative expression was in the body of the act and not in its title; that a public service commission is not an essential part of the government of a

first class city and therefore there has been no such void or deficiency in such city government as could be supplied and supplemented with a law imposing upon such city a public service commission; that it may be assumed, from the text of the act, that it relates to a public service commission although the title of said act of March 11, 1929 (Acts 1929 page 252) imparts no information as to whether it means to impose upon the city a supplement relating to garbage, parks, boundaries, sanitation, gypsies and peddlers, public improvements, dog-licenses, taxation, recreation centers or finance; that an amendment of said act of March 6, 1905, is not mentioned in the title of said act of 1929; that said acts of 1905 and 1929 have different and inconsistent standards of determination of the class of cities to which they respectively pertain in this, viz. That said act of 1905 pertains to first class cities, in a series of cities, having a population of 100,000 or more, and as they then existed, whereas said act of 1929, pertains to cities having a population of not less than 300,000 in the year 1929; if the act of 1929 be a supplement to the act of 1905 then it must be so written as to come within the date of the act of 1905. But in 1905 there was no Indiana city which had a population of not less than 300,000; therefore there was in 1905 no Indiana city to which the act of 1929 can apply as a supplement.

"Nor can the act of 1929 be made to function effectively as an act creating an additional department of the city of Indianapolis because of Article XIII of the Constitution of Indiana; that at the time said act was passed the assessed valuation of property in Indianapolis was \$666,461,290 which furnished a bonding capacity of \$13,329,225.80 as against which there were outstanding the several issues of bonds to wit:

| | |
|-------------------------|------------------------|
| City, general | \$ 7,217,050.00 |
| Sanitary district | 3,555,500.00 |
| Park district | 3,130,000.00 |
| Total | <u>\$14,002,550.00</u> |

"That at the time said sanitary and said park district bonds were issued, it was supposed by some persons, that said Sanitary district and said Park district were, respectively, municipal units separate and distinct from the municipal city of Indianapolis, but any such false impression was removed by the decision of the Supreme Court in *State Board v. State ex rel*, (1926) 198 Ind. 343, 350;

that at this present time the bonded debt of Indianapolis is at its summit and there is no financial capacity on the part of Indianapolis without the aid and assistance of the court as herein set forth, to take over said Citizens Gas Company, if to do so will require said municipal city to incur any debt, and this fact had been well known to the defendants herein since July 26, 1926, the date of said Supreme Court decision; that said act of March 11, 1929, cannot be interpreted and construed to have created a special assessment district, for the reasons following to-wit: (1) The title of said act does not state that the creation of such assessment district is the subject, or the purpose or the object of the act; (2) That said act contains no definition of the boundaries of any assessment district, nor the purposes thereof nor any procedure in respect thereto; that there is no method prescribed for fixing the value of property to be taken by assessment, nor of the value of the property to be assessed, nor is there any notice of valuation, assessment or maturity nor for the definition and administration of any lien such as would arise upon an assessment.

"Plaintiffs say that said act of March 11, 1929, can have no effect other than to hinder, delay, obstruct and defeat the taking over of said Citizens Gas Company by said City of Indianapolis without the aid and assistance of this court in this suit and that for this fact, as well as others present upon the record, this Honorable Court should sequester said Citizens Gas Company and take over all its property with a receivership in which authority should be granted to said receiver, and he should be directed and required, to issue his receivers certificates whose payments should be secured with a proper pledge of said property, with which to pay all determined debts and thereupon deliver said Citizens Gas Company, clear and free from any obligation whatsoever, through the administrative agency of this court in this suit, to said City of Indianapolis as trustee of said Public Charitable Trust, and unless this can be done these plaintiffs as inhabitants and taxpayers of said city, and all other persons similarly situate, all of whom are cestuis que trustent of said Public Charitable Trust, will be denied all remedy whatsoever and their property will be confiscated and taken without due process of law and in denial of the equal protection of the law, all in contravention of the Fourteenth Amendment of the Constitution of the United States; and this federal right these plaintiffs now expressly set up and

claim and they ask this court to determine and adjudge and sustain said claim in this suit.

"That said act of March 11, 1929, and each and every act of the defendants, and any of them, thereunder, should be determined and adjudged to be unlawful and to constitute a cloud upon the title of said Public Charitable Trust which should be removed by the proper decree of this court in this suit.

(31).

"That said conspirators are now contriving to have numerous suits brought to defeat said Public Charitable Trust; that it is the agreed and accepted policy of the defendants city of Indianapolis and its various officers, agents, servants and representatives of said Citizens Gas Company functioning as ever under the control of said conspirators, that no affirmative claim shall be made in any of said suits, and that no demand shall be made as an affirmative right that said Public Charitable Trust shall be preserved and the property of said Citizens Gas Company be turned over and delivered to said City of Indianapolis as trustee of said Public Charitable Trust and for the use and benefit of said inhabitants and taxpayers, including these plaintiffs; that a multiplicity of suits to destroy said Public Charitable Trust is threatened and the solvency of said Public Charitable Trust as a corporation sole is in imminent danger; that a receiver should be appointed to take over said Public Charitable Trust and protect and execute the same and that such receivership should include the sequestration and administration of the property of both said Citizens Gas Company and said Indianapolis Gas Company, and all appropriate relief should be granted.

(32).

"Wherefore plaintiffs demand judgment that the said franchise contract of August 25, 1905, by and between the City of Indianapolis by and through its board of public works and Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, as approved by ordinance of the common council of the City of Indianapolis on August 30, 1905 be determined and adjudged to be, and to have been, acts sufficient to have created and that they did create a Public Charitable Trust for the uses and purposes therein set forth and that thereby the inhabitants and taxpayers of said City of Indianapolis including these plaintiffs be

came and they are now the cestuis que trustent of said Public Charitable Trust; and that said trust being for the use and benefit of said cestuis que trustent their acceptance of its terms and provisions will be implied and that the same thereupon became and ever since have remained inviolate; that the formation of said Citizens Gas Company and the transfer to it of said franchise contract of August 25, 1905, as approved by ordinance of the common council of said city on August 30, 1905, be determined and adjudged to have been acts in aid and advancement of said Public Charitable Trust and for the use and benefit of said cestuis que trustent and that their acceptance of the terms thereof will be implied and that thereby a contract was made and constituted which became inviolate under the Constitutions, respectively of the State of Indiana and of the United States, and that these plaintiffs are competent to have title of said Public Charitable Trust in this suit forever quieted and set at rest in the City of Indianapolis as trustee for the inhabitants and taxpayers of said city as against the said pretenses and claims, to the contrary, of these defendants and each of them; that the said pretenses of the defendants and each of them be determined and adjudged to be unlawful and without right; that the said pretended act of the General Assembly of Indiana entitled 'An act concerning Public Utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.' Approved March 4, 1913, be determined and adjudged to be void and of no effect; that each and all the acts, orders and promulgations of said Public Service Commission purporting to affect, in any manner whatsoever, said Citizens Gas Company be determined and adjudged to be void; that said pretended agreement of lease of the property, franchise and effects of said Indianapolis Gas Company by said Citizens Gas Company of Indianapolis, dated September 30, 1913, and the pretended approval thereof by said Public Service Commission, dated October 1, 1913, be determined and adjudged to be void and of no effect and that the moneys laid out and expended, and paid on account thereof, are in equity the property of said Public Charitable Trust and as such are properly recoverable from said Indianapolis Gas Company as moneys by it had and received; that said Indianapolis Gas Company be determined and adjudged to be insolvent and that its insolvency and its inability to repay

the moneys had and received by it, towit, ten million dollars, from said Citizens Gas Company of Indianapolis renders said Citizens Gas Company of Indianapolis also, insolvent, or puts it in imminent danger of insolvency; that because of the insolvency of each of said corporations a receiver for them should be appointed in this suit; that if said receivership shall be docketed separately, as to each corporation, for better service of administration, the receivership of said Citizens Gas Company should be adjudged and defined as the major and dominant receivership and the receivership of said Indianapolis Gas Company should be adjudged and defined as the minor and subordinate receivership, the court reserving authority and right to transfer any claim and proceeding from one receivership to the other as justice may require, always, however, upon the condition that no action shall be taken in the receivership of said Indianapolis Gas Company which shall be controlling and not subject to review in the receivership of said Citizens Gas Company of Indianapolis, all to the end that there never shall be any conflict between said receivership interests which would obstruct the due administration of justice; that the complexity of rights and issues and the multiplicity of claims, rightfully to become the matter of judicial inquiry and determination, affecting each of said Gas Companies, are such that the assets of said companies are likely to become dissipated and wasted unless the court shall sequester said property with a receivership to be created in this suit, and to be subject to sequestration for administrative purposes as hereinbefore set forth; that in said receivership and receiverships, all conflicting claims and interests should be determined and adjudged and liquidation and payments should be made and enforced accordingly, to the end that complete justice may be done to all parties in interest, and that said Public Charitable Trust in behalf of the inhabitants and taxpayers of said City of Indianapolis may be preserved and enforced; that upon the completion of said liquidation the receiver of said Citizens Gas Company of Indianapolis, should, under the order of this court then to be made and entered, turn over and deliver all the property, rights, privileges, franchises and effects whatsoever of said Citizens Gas Company and of said receiverships, and each of them, to said City of Indianapolis as trustee of said charitable trust, and said City of Indianapolis should be ordered and required to accept said property and said Public Charitable Trust en-

tailed thereon, and to carry into effect and perform said trust as equity and justice shall command; that the defendants John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh and Jere West, and each of them, and their successors in office as said Public Service Commission of Indiana, should be restrained and enjoined from accepting and acting upon any petition for any order, and from acting upon their own initiative and motion in the contemplation of any order, now or hereafter to be made, entered and issued in any manner whatsoever affecting the property, franchises, privileges, rights and interests of each, and of either, of said corporations, viz: said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company; that the defendants Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, and William J. Mooney, and each of them, be restrained and enjoined from acting, and assuming to act, in any manner whatsoever, as the board of trustees of utilities pursuant of any authority and power purporting to be conferred by said pretended act of the General Assembly of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipal corporations"', approved March 6, 1905,' approved March 11, 1929; that said defendants Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Rudell and Guy A. Wainwright, and each of them, be restrained and enjoined from acting, and assuming to act in any manner whatsoever, as the board of directors for utilities pursuant of any authority and power purporting to be conferred by said pretended act of the General Assembly of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipal corporations,"' approved March 6, 1905,' approved March 11, 1929; that the defendants City of Indianapolis, a municipal corporation, Reginald H. Sullivan, as mayor of said City of Indianapolis; Henry O. Goett, as city clerk of said city of Indianapolis; E. Kirk McKinney, Louis C. Brandt and Charles O. Britton, as the Board of Public Works of said City of Indianapolis, and each and every of its officers, agents, servants and representatives be restrained and enjoined from any and every act and omission intended to give aid and comfort to any and every person whomsoever seeking to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over of said Citizens Gas Company of Indianapolis by said City of Indianapolis

as trustee of said Public Charitable Trust pursuant of the terms of said Public Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its Board of Public Works, as one party, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as the other party, and approved by the common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved and confirmed; that said defendants Indianapolis Gas Company, Clarence L. Kirk, Frederick G. Rastenburg, Paul E. Crozier and each of them, their servants, agents, representatives and attorneys, and each of them, be restrained and enjoined from any and every act and omission, and from conspiring, confederating and agreeing together and with any other person whomsoever with the intent, by any act or omission, to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over of said Citizens Gas Company of Indianapolis by said City of Indianapolis, as trustee, of said Public Charitable Trust pursuant of the terms of said Public Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its board of public works, as one party, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as the other party, and approved by the common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved, and confirmed; that said defendants Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Frankiin Vonnegut, and John R. Welch and each of them be continued in office as the Board of Directors of said Citizens Gas Company until their several terms of service would otherwise expire; that they and each of them their agents, servants, representatives and attorneys and each of them be restrained and enjoined from any and every act and omission, and from conspiring, confederating and agreeing together, and with any other person whomsoever, with the intent, by any act or omission, to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over by said Citizens Gas Company of Indianapolis, as trustee, of said Public

Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its board of public works, as one party, and Alfred F. Potts, Frank D. Stalaker and Lorenz Schmidt, as the other party, and approved by common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved and confirmed, and that said named defendants be ordered and required to aid and assist the receiver appointed by this court herein to carry forth and into final, true and complete performance each and every duty of his said trust herein as an officer of this court, in the revelation and disclosure of all the rights and equities of any and every person whomsoever and in bringing the same to the attention and information of the court by proper procedure, all to the end that complete justice may be done herein as a condition precedent to the turning over of said Citizens Gas Company of Indianapolis, its franchises, licenses, properties and effects of whatsoever kind and wheresoever situate, to said City of Indianapolis, as trustee; that said defendants Ferdinand Winter and Trust Company of America, as trustees, named in a certain pretended mortgage executed on to-wit October 1, 1902, by said Indianapolis Gas Company to secure the payment of an authorized issue of \$7,500,000.00 bonds, payable in gold with interest at 5 per centum per annum and due fifty years after date, be ordered and required to bring said mortgage into court and to make full and complete disclosure concerning the same including the amount of said bonds issued, their legality and their value, and if need be to defend the same at the petition of the receiver herein to have said bonds and mortgage adjudged inferior and subsequent in equity and right to the claim of said Citizens Gas Company of Indianapolis for moneys by it laid out and expended, out of the proceeds and property of said Public Charitable Trust, to replace and preserve the physical property embraced in said pretended mortgage and to maintain and enhance its value for the use and benefit of said pretended mortgagees and their cestuis que trustent, and for all which said Citizens Gas Company of Indianapolis has received no lawful consideration whatsoever, and to require said trustees to defend said mortgage against this suit to have said mortgage lien adjudged to be an unlawful cloud upon the title to said property and to have said cloud removed by the judgment of this court herein; that a receiver be

appointed herein, upon ten days' notice to be hereafter given, who shall be neither a party, nor attorney, nor other person in this suit, and who before entering upon his duties shall be sworn to perform them faithfully, and with sureties approved by the court, unless otherwise qualified, execute a written undertaking, payable to such person as the court, or the judge thereof in vacation, shall direct, to the effect that he will faithfully discharge the duties of receiver in this suit and obey the orders of the court or judge thereof and who shall have power under control of the court, or of the judge, thereof, in vacation, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, in his own name as receiver, and generally to do such acts respecting the property as the court or judge thereof may authorize; that the injunction as severally herein prayed for, shall be issued upon hearing respectively after five days' notice to the party and parties concerned; that said injunction shall be issued in the first instance as a temporary injunction and shall continue as such until the trial of the cause when they each shall be continued and made perpetual injunctions.

"And plaintiffs pray for all proper relief."

(Verification.)

1158 PLAINTIFFS' STIPULATION EXHIBIT 36.

Supplemental Complaint in Williams Case.

This supplemental complaint is copied on pages 228-230, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of *Williams v. Citizens Gas Company, et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

"Allen G. Williams, as a Resident and Taxpayer etc., plaintiff, reaffirms the averments of the complaint herein and says as a supplement thereto:

"(1). That John J. Madden, a defendant named in the complaint as a member of the Board of Directors for Utilities of said City of Indianapolis, has departed this life since the complaint herein was filed and that the vacancy caused by his death has not been filled.

"(2). That the present bonded indebtedness of said City of Indianapolis is towit:

| | |
|------------------------------------|-----------------|
| City of Indianapolis, proper | \$11,245,220.00 |
| Sanitary District | 3,511,000.00 |
| Par Commissioners | 3,354,050.00 |

\$18,110,270.00

That the City's assessed valuation of property for taxation is\$691,336,210.00

(3). That on Monday the 18th day of May, 1931, the Supreme Court of the United States denied petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the Cases of *Todd v. Citizens Gas Company of Indianapolis et als.*, and in *Cotter v. Citizens Gas Company of Indianapolis et als.*, being Nos. 885 and 886 respectively. October Term, A. D., 1930 and the docket of the Supreme Court of the United States; that these causes had their origin in the United States District Court for the Southern District of Indiana, Indianapolis Division, and while said causes were there pending an order was entered in said causes restraining this plaintiff from further prosecuting this cause in this court during the pendency of said suits in the courts of the United States; that the said ruling of said Supreme Court in denying said petition for writs of certiorari absolves this plaintiff and this court from any and every restraint whatsoever in the further prosecution of this suit in this court.

"(4). That the present value of the indebtedness of the Indianapolis Gas Company for moneys had and received by it for replacement, extensions, taxes and other items is \$8,714,687.66 to which may be added an annual fee of 10 per cent on the amount, for supervision etc., and in the aggregate \$9,583,155.00; that said indebtedness is owing because of the diversion of funds from the Public Charitable Trust represented by said Citizens Gas Company and in which this plaintiff and all persons similarly situate have an interest and which they are entitled to recover herein for and in behalf of said Public Charitable Trust.

"Wherefore plaintiff demands judgment that this memorandum be admitted to the record as a supplement to the pending complaint and that upon said complaint as supplemented he have judgment and the full measure of relief demanded in said original complaint."

1159 PLAINTIFFS STIPULATION EXHIBIT 37.

State of Indiana, }
County of Marion. } ss.

IN THE MARION SUPERIOR COURT.

Allen G. Williams, et al.,
 vs.
Citizens Gas Company of Indianap- } No. A-53965.
 olis, et al.

SEPARATE AND SEVERAL MOTION OF CERTAIN
DEFENDANTS, CITIZENS GAS COMPANY OF IN-
DIANAPOLIS, ET AL., TO STRIKE OUT PARTS
AND PORTIONS OF PLAINTIFFS' COMPLAINT.

Come now Citizens Gas Company of Indianapolis, a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Grosier, City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britten, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainright, as the Board of Directors for Utilities of said City of Indianapolis, defendants in the above entitled cause, and separately and severally move the court to strike out the following parts and portions of plaintiffs' complaint:

1. Subdivision 28 of plaintiffs' complaint which is as follows:

1160 (Here subdivision 28 of the complaint in the above entitled action was copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. The above subdivision of plaintiffs' complaint attacks as without jurisdiction and void a final decree entered by the United States District Court for the District of Indiana and not reversed, modified, or set aside, but finally affirmed, in a case brought by the Citizens Gas Company of Indianapolis against the Public Service Commission of Indiana in which suit an order of the Public Service Commission was held to be violative of rights guaranteed to the Citizens Gas Company under the Fourteenth Amendment to the Federal Constitution in that said order was confiscatory. It appears that the District Court of the United States had jurisdiction of both the subject matter and the parties to that action and plaintiff can not in a collateral proceeding attack the decree there entered.

Second. The proceeding before the Public Service Commission to procure compensatory rates for gas furnished by the Citizens Gas Company to its consumers was a proper one. So far as the rates are concerned the city could not by contract fix a rate which would deprive the General Assembly of authority to authorize the collection of higher rates through the medium of the Public Service Commission, acting under legislative authority, failed to prescribe just and reasonable rates the company was entitled to maintain a confiscation case in the Federal Court and the ruling of that court could be attacked only by an appeal.

1161 Third. The plaintiff is attempting to re-litigate in the State Court issues decided in a case in the Federal Court which had jurisdiction of the parties and the subject matter and this the plaintiff has no right to do.

Fourth. The United States District Court for the District of Indiana has power, notwithstanding the provisions of U. S. R. S. Section 720, to restrain the prosecution of an action in the State Court which would interfere with a valid decree entered in the Federal Court in a case in which that court had jurisdiction of the subject matter and the parties. This court should therefore, in order to avoid any conflict in jurisdiction, strike from this complaint any averments which seek to reopen judicial questions finally disposed of by a final and valid decree of the Federal Court.

2. To strike out from plaintiffs' complaint the following portion thereof being a part of paragraph 20 and reading as follows:

"That thereupon it was designed by said confederates

that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the constitutional restrictions of the state and by those means destroy said public charitable trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burden of replacing said Indianapolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said City of Indianapolis."

For the following reason:

There can not be in law any such thing as a conspiracy to bring about the enactment of a valid public statute. The averment that certain persons confederated to cause the creation of the Public Service Commission Act to circumvent constitutional restrictions is without any effect and attempts to present an issue to this court which it has no right or authority to determine.

3. Subdivisions 22, 23, and 29 of plaintiffs' complaint, which are as follows:

(Here subdivisions 22, 23 and 29 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. These subdivisions of the plaintiffs' complaint challenge a lease executed by Citizens Gas Company and Indianapolis Gas Company and approved by the Public Service Commission of Indiana. The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities and it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that Commission can not be collaterally attacked.

Second. There is no averment in the complaint which shows any ground on which the plaintiff can successfully attack collaterally the order of the Public Service Commission approving said lease. There is no showing in

the complaint that the Commission was without jurisdiction to approve the lease between the Indianapolis Gas Company and the Citizens Gas Company or that it exceeded its jurisdiction or that the approval of the lease was procured by any fraud.

1163 Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same.

4. To strike out those portions of the plaintiffs' complaint constituting subdivisions 18 and 19, which are as follows:

(Here subdivisions 18 and 19 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

And that part of subdivision 20 reading as follows:

• • • • •
"Here is quoted the first three grammatical paragraphs of subdivision (20) of the complaint in the Williams case, which complaint is set forth as Plaintiff's Stipulation Exhibit-33)".

35

(Inserted pursuant to stipulation filed November 22, 1939.)

1164 For each of the following reasons:

First. Such portions of said complaint relate to the organization of the Indianapolis Gas Company, the history of its operations, the character and extent of its property at and prior to the making of the lease to the Citizens Gas Company referred to in the complaint and to the alleged conspiracy between certain individuals to bring about the protection and betterment of the property of the Indianapolis Gas Company through the lease thereof to the Citizens Gas Company. None of these allegations have any relevancy except as they relate to the lease of said property to the Citizens Gas Company. Inasmuch as said lease was duly approved by the Public Service Commission of Indiana, pursuant to the power given it by law the plaintiff is in no position to attack the same, for the reasons heretofore given.

1165 Second. The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company having been validly made, the actions of any individuals leading up to such lease are wholly immaterial.

Third. The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust.

5. To strike out that part and portion of plaintiffs' complaint in Subdivision 24 thereof reading as follows:

(Here subdivision 24 of the complaint in the above entitled action was copied in full, with the exception of that portion of subdivision 24 set forth in subdivision 6 of the within motion, being the last complete paragraph of said subdivision 24. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. Said portion of the plaintiffs' complaint refers to certain expenditures made by the Citizens Gas Company for the alleged use and benefit of the Indianapolis Gas Company, but shows that all of said expenditures were made pursuant to the lease between the two companies approved by the Public Service Commission of Indiana.

Second. In the absence of any possible valid objection to the jurisdiction of the Public Service Commission of Indiana in approving the execution of said lease, the plaintiff is not entitled to present to this court for
1166 its consideration any question as to the expenditures made under such lease so approved by the Public Service Commission.

6. To strike out all that part and portion of subdivision 24 of the plaintiffs' complaint reading as follows:

• • • • •
“(Here is quoted the last grammatical paragraph of subdivision (24) of the complaint in the Williams case,

which complaint is set forth as Plaintiffs' Stipulation Exhibit 35)''.

(Inserted pursuant to stipulation filed November 22, 1939.)

For each of the following reasons:

First. The Act of March 4, 1913, with the amendments thereto, creating the Public Service Commission of Indiana is a valid law and is not contrary to any provision either of the Constitution of the State of Indiana or of the Federal Constitution.

Second. The validity of Public Service Commission Acts in their general provisions has been so long established by repeated adjudications of both the State and Federal Courts that the attack upon the Indiana Act should not be considered by the court as an issuable question in this cause.

1167 Third. The business of public utilities is touched with a public interest and is subject to state regulation which may be exerted directly by legislative authority or by administrative bodies duly constituted with power to that end and the Indiana statute creating the Public Service Commission is valid.

7. Subdivisions 26 and 27 of plaintiffs' complaint which are as follows:

(Here subdivisions 26 and 27 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. Said subdivisions of plaintiffs' complaint challenge the validity of the surrender by the Citizens Gas Company of its franchise, of the law under which such surrender was permitted and generally the validity of the Public Service Commission statute.

Whatever the effect of the surrender of the franchise, the right of the Citizens Gas Company to surrender its franchise and take out an indeterminate permit has been conclusively established by the Supreme Court of Indiana. The Statute authorizing such surrender amounted to nothing more than an offer to the Citizens Gas Company to surrender its franchise and take out a permit and the statute was a perfectly valid one.

Second. For the reasons assigned in the last preceding subdivision the law creating the Public Service Commission of Indiana is valid and is not open to attack.

8. That part of Subdivision 25 of plaintiffs' complaint reading as follows:

1169 " (Here is quoted the last grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

Also, that part of Subdivision — (on pages 101 and 102 of plaintiffs' complaint) reading as follows:

"(Here is quoted all of subdivision (31) of the bill of complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

1169 For each of the following reasons:

First. There is no showing in the complaint that the certificate holders of the Citizens Gas Company have been paid in full the amounts due them under their certificates and the ordinance set out in the complaint shows that such certificates must be paid in full before the property can be conveyed to the City of Indianapolis.

Second. There is no averment in these portions of the plaintiffs' complaint or elsewhere that the Citizens Gas Company of Indianapolis and the City of Indianapolis have not resisted and are not resisting vigorously the asserted right of the benefit certificate holders to take over this property. No such averment could truthfully be made and this explains its absence.

Third. The plaintiffs show no ground on which they can invoke the jurisdiction of this court with respect to a public charitable trust and no right to have a Receiver appointed to administer the property of the Gas Company.

Fourth. The Attorney General of the State of Indiana is the sole and exclusive officer who has the right to call upon a court of equity to administer a public charitable trust in the event of misapplication of the trust res by

the trustee. There is no showing of inaction on the part of the Attorney General, and he is not made a party to this suit.

Fifth. It has been finally adjudicated by Courts of competent jurisdiction, that a public charitable trust exists in the property of the Gas Company: *Todd v. Citizens Gas Company*; *Cotter v. Citizens Gas Company*, 46 Fed. (2nd) 855.

9. To strike out all that part of subdivision 25 of plaintiffs' complaint reading as follows:

1170 * *

"(Here is quoted the first grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

For the following reasons:

This portion of the plaintiffs' complaint seeks to attack the validity of an issue of bonds by the Indianapolis Gas Company and shows upon its face that the plaintiff 1171 has no knowledge as to their legality, but having no knowledge, denies such legality. These defendants can not be called upon to litigate the legality of said bond issue upon such insufficient averments.

10. To strike out that portion of Subdivision 30 of the complaint reading as follows:

* *

"(Here is quoted the next to the last paragraph of subdivision (30) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

For the following reason:

This averment asks this court to sequester the property of the Citizens Gas Company and issue Receiver's Certificates with which to pay all determined debts of the Citizens Gas Company and thereupon to turn the property of the Gas Company over free and clear of any obligation whatever to the City of Indianapolis.

1172 The plaintiffs have no right to invoke the juris-

diction of this court in seeking to sequester the property of the Citizens Gas Company.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel.

Wm. H. Thompson,
Albert L. Rabb,

Thomas D. Stevenson,

Attorneys for defendants, City of Indianapolis in the State of Indiana, a Municipal Corporation, Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goettl, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britten, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainright, as the Board of Directors for Utilities of said City of Indianapolis.

Smith, Remsler, Hornbrook &
Smith,

Henry Hornbrook,

Attorneys for defendants, Citizens Gas Company of Indianapolis, a corporation, Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymsen, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Crosier.